

CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1951

No. 83

ANTONIO RICHARD ROCHIN, PETITIONER,

vs.

PEOPLE OF THE STATE OF CALIFORNIA

**ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL FOR
THE SECOND APPELLATE DISTRICT OF THE STATE OF CALIFORNIA**

PETITION FOR CERTIORARI FILED APRIL 9, 1951.

CERTIORARI GRANTED MAY 28, 1951.

OCTOBER TERM, 1951

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PEOPLE OF THE STATE OF CALIFORNIA

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 11, 1951.

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[fol. 1]

**IN THE SUPERIOR COURT OF THE STATE OF
CALIFORNIA IN AND FOR THE COUNTY OF LOS
ANGELES**

S. C. No. 128156

THE PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff,*

v.

ANTONIO RICHARD ROCHIN, *Defendant*

INFORMATION—Filed August 24, 1949

Vio. Sec. 11500, Health and Safety Code

The said Antonio Richard Rochin is accused by the District Attorney of and for the County of Los Angeles, State of California, by this information, of the crime of Violation of Section 11500, Health and Safety Code of the State of California, a felony, committed as follows: That the said Antonio Richard Rochin, on or about the 1st day of July, 1949, at and in the County of Los Angeles, State of California, did willfully, unlawfully and feloniously have in his possession a preparation of morphine, in violation of Section 11500, Health and Safety Code of the State of California.

W. E. Simpson, District Attorney for the County of Los Angeles, State of California, By Harold O. Pressman, Deputy.

[fol. 2] [File endorsement omitted.]

[fol. 3] **IN THE SUPERIOR COURT IN AND FOR THE COUNTY OF
LOS ANGELES**

[TITLE OMITTED]

MINUTE ENTRIES—August 26, 1949

Deputy District Attorney Harry C. Johnstone and the Defendant without counsel, present. The Public Defender is appointed by the Court as counsel for the defendant,

Deputy Public Defender David A. Kidney being present. David C. Marcus, being present, is substituted as counsel for the defendant in place and stead of the Public Defender, attorney of record. Defendant is duly arraigned, states his true name to be as charged in the information, waives reading of the information and time to plead, regularly enters his plea of "Not Guilty as charged in the information" and the trial of the action is thereupon set for September 13, 1949 at 9:00 A. M. and transferred to Department 46. Defendant may remain on bail.

[fol. 4]

TUESDAY, SEPTEMBER 13, 1949

[TITLE OMITTED]

Cause is called for trial. Deputy District Attorney Joseph L. Carr and the Defendant with his counsel, David C. Marcus, present. Trial by jury is waived by the defendant, his counsel and the District Attorney. Jack A. Jones and Clifford Crump are sworn and testify on behalf of the People. People's Exhibits No. 1 (envelope and 2 capsules) and 2 (envelope, contents, spoon and dropper) are marked for identification. Trial is continued to September 15, 1949 at 2:00 P. M.

[fol. 5]

THURSDAY, SEPTEMBER 15, 1949

[TITLE OMITTED]

Trial is resumed. Deputy District Attorney Joseph L. Carr and the Defendant with his counsel, David Marcus, present. On motion of defendant, trial is continued to October 19, 1949 at 9:15 A. M., defendant consenting to said continuance. The Court orders the Court Reporter to furnish a transcript in triplicate of all the proceedings heretofore had in the trial of this action.

[fol. 6]

WEDNESDAY, OCTOBER 19, 1949

[TITLE OMITTED]

Deputy District Attorney Joseph L. Carr and the Defendant with his counsel, David C. Marcus, present. Cause is continued to October 27, 1949 at 9:15 A. M. for further hearing. Defendant may remain on bail.

[fol. 7]

THURSDAY, OCTOBER 27, 1949

[TITLE OMITTED]

Cause is partly argued, being continued from September 13, 1949. Deputy District Attorney Joseph L. Carr and the Defendant with his counsel, David C. Marcus, present. William C. Ring appearing Amicus Curiae, trial is continued to October 28, 1949 at 9:30 A. M. Defendant may remain on bail.

[fol. 8]

FRIDAY, OCTOBER 28, 1949

[TITLE OMITTED]

Trial is resumed with all parties present as before. Argument is resumed. People's Exhibit No. 1 (2 capsules, substance extracted from defendant's stomach) is received in evidence and filed. People's Exhibit No. 2 (spoon and eye-dropper), being part of People's Exhibit No. 2 heretofore marked for identification, is now received in evidence and filed. The remaining part of People's Exhibit No. 2 for identification is not admitted in evidence. Counsel stipulate certain testimony. Marguerite Hernandez and Lucy Rochin are sworn and testify on behalf of the defendant. The defendant is called as a witness in his own behalf, is sworn, but gives no testimony. On motion of defendant, the evidence as to the contents of the capsules, which were not admitted in evidence is stricken out. Defendant's motion to strike People's Exhibit No. 1 is de-
[fol. 9] nied. Defendant's motion to strike certain testimony is denied. Cause is submitted. The Court finds the defendant "Guilty as charged in the information". Defendant makes motion for a new trial. The request of the defendant for leave to file an application for probation is granted. The hearing on said application for probation, the hearing on motion for a new trial and the pronouncing of judgment and sentence are set for November 10, 1949 at 9:00 A. M. Defendant may remain on bail.

[fol. 10]

THURSDAY, NOVEMBER 10, 1949

[TITLE OMITTED]

At 10:00 A. M. Deputy District Attorneys Edwin Myers and Joseph L. Carr and the Defendant with his counsel, David C. Marcus, present. Defendant's motion for a new trial is denied. Defendant gives oral notice of appeal. At 3:30 P. M.: Said defendant withdraws his application for probation. Said defendant is arraigned for judgment and sentence and no legal cause appearing why judgment should not be pronounced, the Court pronounces judgment and sentence as follows: Said defendant is sentenced to the County Jail of the County of Los Angeles for the term of sixty days. This sentence is entered in Judgment Book No. 79, Page 81. Said defendant files a written Notice of Appeal and a request for transcripts. Certificate of Probable Cause is filed. Stay of execution of sentence [fol. 11] pending appeal is ordered. Bond on appeal as to said defendant is fixed in the sum of \$500. Bond is approved filed and said defendant is released thereunder.

[fol. 12] IN THE SUPERIOR COURT IN AND FOR THE COUNTY OF
LOS ANGELES

[TITLE OMITTED]

JUDGMENT—November 10, 1949

Whereas the said defendant, having been duly found guilty in this Court of the crime of Violation of Section 11500, Health and Safety Code of the State of California (Possession), a felony, as charged in the information

It is therefore ordered, adjudged and decreed that the said defendant be punished by imprisonment in the County Jail of the County of Los Angeles for the term of sixty days.

It is further ordered that the defendant be remanded to the custody of the Sheriff of the County of Los Angeles.

Done in open Court this 10th day of November, 1949.

[fol. 13] IN THE SUPERIOR COURT IN AND FOR THE COUNTY OF
LOS ANGELES

[TITLE OMITTED]

NOTICE OF APPEAL—Filed November 10, 1949

Comes now the defendant in the above entitled matter and appeals to the District Court of Appeals in and for the Second Appellate District of the State of California, from the judgment of the above entitled Court made and entered on the 10th day of November, 1949, and from all orders, rulings made by said Court during the trial of said cause and proceedings.

Dated: This 10th day of November, 1949.

David C. Marcus, Attorney for Defendant.

[File endorsement omitted.]

[fol. 14] IN THE SUPERIOR COURT IN AND FOR THE COUNTY OF
LOS ANGELES

[TITLE OMITTED]

STATEMENTS OF GROUNDS OF APPEAL AND REQUEST FOR
CLERK'S AND REPORTERS TRANSCRIPT—Filed November
10, 1949.

To the Superior Court of the State of California in and
for the County of Los Angeles:

Comes now the defendant Antonio Richard Rochin, in the above entitled matter and states, in general terms, the grounds of his appeal and the points on which he relies for the basis of this appeal as follows:

- (1) That the judgment is against the law.
- (2) That the judgment is contrary to the evidence.
- (3) That the judgment is contrary to the law and evidence.
- (4) That the District Attorney has been guilty of prejudicial misconduct.

(5) Newly discovered evidence material to the defendant and which he could not with reasonable diligence have discovered and produced at the trial.

[fol. 15] (6) That the said defendant, pursuant to the provisions of Section 7, Rule 2 of the Rules of the Judicial Council and of the Supreme Court and District Court of Appeals; does hereby apply to the above entitled Court for a full and complete transcript of all the phonographic notes taken on the arraignment of the said defendant in the Superior Court; all the phonographic notes taken on the trial and sentence of said defendant and all the phonographic notes taken during each and all of the appearances of the defendant in the above entitled Court; and all papers and documents, affidavits and writing in support thereof; the certificate of probable cause on appeal, including all writings, affidavits, notices and other documents on said proceedings including all statements made by the District Attorney and Attorney for defendant and any and all remarks and comments made by them or either of them as all of said notes will be necessary to fairly present to the Appellate Court the points relied upon by the said defendant on said appeal.

Dated: This 10th day of November, 1949.

David C. Marcus, Attorney for Defendant.

"So Ordered", W. Turney Fox, Judge.

Dated: Nov. 10, 1949.

[fol. 16] [File endorsement omitted.]

[fol. 17] Clerk's Certificate to foregoing papers omitted in printing.

[fol. 18] IN THE SUPERIOR COURT IN AND FOR THE COUNTY OF
LOS ANGELES

[TITLE OMITTED]

Reporter's Transcript of Proceedings.

September 13, 15, October 19, 27, 28 and November 10, 1949

[fol. 19]

Los Angeles, California,

Tuesday, September 13, 1949. 2:50 P. M.

The Court: Are you gentlemen ready to proceed in People vs. Rochin?

Mr. Carr: Yes, sir.

Mr. Marcus: Ready, your Honor.

Mr. Carr: I don't believe there is a waiver of jury yet.

The Court: That is right.

Mr. Rochin, do you desire to be tried by a jury or be tried by the court without a jury?

The Defendant: Tried by the court, your Honor.

The Court: Without a jury?

The Defendant: Yes, sir.

The Court: You join in the waiver, Mr. Marcus?

Mr. Marcus: I do, your Honor.

The Court: People join?

Mr. Carr: Yes, sir.

The Court: All right, gentlemen, that means that we are ready to proceed, I take it, with the evidence.

Mr. Carr: Mr. Jones, will you come forward, please?

JACK A. JONES, called as a witness on behalf of the People, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Jack A. Jones.

[fol. 20]

Direct examination.

By Mr. Carr:

Q. Mr. Jones, what is your business or occupation?

A. Deputy sheriff, assigned to the Sheriff's narcotic detail.

Q. Was that your occupation on the 1st of July, 1949?

A. Yes, it was.

Q. I direct your attention to the defendant. Did you see him that day?

A. Yes, I saw him on that day.

Q. About what time was it when you first saw him?

A. It was approximately 9:00 o'clock a. m.

Q. In the morning?

A. In the morning.

Q. Where was that?

A. It was at a residence at 1700 East 69th Street.

Q. In this county?

A. In the County of Los Angeles.

Q. What was it that directed your attention to the defendant?

A. I had some information that he was selling narcotics.

Mr. Marcus: I move that be stricken.

Mr. Carr: That may go out.

Mr. Marcus: Just a moment.

Mr. Carr: That may go out.

[fol. 21] Mr. Marcus: I move that be stricken and the witness instructed, your Honor.

The Court: That goes out, and the one juror is instructed also.

By Mr. Carr:

Q. Now, did you go to that residence?

A. Yes, I did.

Q. Did you go alone or did someone go with you?

A. I was in company with Deputy Shelton and Deputy Smith.

Q. Are they also deputy sheriffs of this county?

A. Yes, they are.

Q. And they worked with you?

A. Yes.

Q. What type of a premise is it? I mean, is it a residence or a store building or a meat market or what?

A. It is a residence, two-story residence.

Q. When you went in there, did you go to any part of that residence?

A. Yes, I went upstairs.

Q. Some particular room?

A. I went up a stairway and I encountered the kitchen. I then turned to the left and went through a door, and that is when I saw the defendant.

Q. What were the furnishings of that room?

A. There was a bed and a dresser and also a little night stand next to the bed.

[fol. 22] Q. Was there anyone in the room other than the defendant?

A. Yes, there was a woman who gave her name as Hernandez.

Q. Did you approach the defendant?

A. Yes, I did.

Q. Where in that room was the defendant when you approached him?

A. He was seated on a bed facing me.

Q. Where was this Hernandez girl?

A. She was laying prone upon the bed.

Q. The same bed?

A. Yes, the same bed.

Q. All right. Did you say anything to the defendant or did he say anything to you as you approached him?

A. No, he did not say anything while I was approaching him. However, when I went over to the defendant and stopped, I looked down at the night stand and at that time I saw two capsules which were wrapped in cellophane.

Q. When you speak of cellophane, is that the same stuff that comes on the outside of cigarette packages?

A. Yes.

Q. What was done by anyone there in reference to that package of two capsules?

A. I pointed at the capsules and I asked the defendant, I said, "Whose stuff is this?" and he immediately leaned [fol. 23] over and grabbed the two capsules and placed them in his mouth.

Q. All right. Then what happened?

A. Deputies Smith and Shelton and myself—we tried to recover the capsules from his mouth. However, we were not successful.

Q. Then what happened?

A. I then took the defendant to the Angelus Emergency Hospital. It is located at 925 South Arizona in East L. A.

Q. Now, from the time that you tried to remove the

capsules from the defendant's mouth until you got over to the hospital, did you have any conversation with the defendant?

A. Yes, I did. Immediately after the struggle with the defendant in the room, I asked him where the capsules were, and he stated, "I threw them under the bed."

However, a search was made under the bed and they were not found there.

I then took him outside into an automobile, and he said when we got in the automobile, he says, "Well, I threw them on the sidewalk," he says, "as we were going out to the car."

However, I took the defendant immediately to the hospital.

Q. When you got him over to the hospital, was there some doctor in attendance there?

A. Yes, there was a Dr. Meir.

[Feb. 24] Q. Did you see whether or not the doctor did anything to the defendant?

A. Yes. I saw him place a tube down the defendant's throat and he also obtained a white pail. I looked into this pail prior to the doctor placing this pail by the defendant, and I saw that it was empty.

Q. Was there one end of the tube placed in or near the pail?

A. No, it was not.

Q. Now, did the doctor then do something after putting the tube down the defendant's mouth and placing the pail there?

A. Yes. He released a liquid solution into the tube and into the defendant's stomach.

Q. Did you see something come out of the other end of the tube?

A. Yes, there was something that came out of the defendant's mouth, that is, the liquid that had gone through the tube into the defendant's stomach—expelled this liquid and I saw two capsules in cellophane floating on the top of this pail and I recovered them.

The Court: How was that again? You saw two capsules—what?

The Witness: There were two capsules that were ex-

pelled from the defendant's mouth, and they went into the pail, and I recovered them from the pail.

[fol. 25] By Mr. Carr:

Q. Were those capsules still wrapped in cellophane?

A. They were still wrapped in cellophane.

Q. What did you do with those capsules?

A. I obtained a small envelope from the doctor and I placed the capsules in this envelope.

Q. What did you later do with the envelope and the capsules?

A. I later took it to the Crime Lab for analysis.

Q. Did you turn them over to any particular technician over there?

A. Yes, to Mr. Crompt.

Q. Now, after the defendant had expelled these two capsules there at the hospital, was there anything else done with the defendant there?

A. Yes. He was taken back to his residence at 1700 East 69th Street where the other two officers were, that is, Deputy Shelton and Deputy Smith; and at that time they turned over to me some empty capsules—I believe there were five empty capsules—that had a white residue, and also a spoon that was blackened on the bottom, and also an eye dripper.

The Court: Also a what?

The Witness: An eye dripper. There was also a package of white powder.

By Mr. Carr:

Q. What was done with those items, that is, the empty capsules, the eye dripper, and the spoon?

[fol. 26] A. They were all turned over to Mr. Crompt.

Q. Now, how long have you worked narcotics, Mr. Jones?

A. Approximately three and a half years.

Q. During that period of time have you come in contact with persons who were addicted to the use of narcotics?

A. Yes, I have.

Q. During that time have you come in contact with persons who in their addiction inject the substance into their blood stream?

A. Yes.

Q. Do you know what is meant by the "main line," that is, the radial artery on the inside of the arm going from the vicinity of the biceps, the inside of the elbow and down the forearm?

A. Yes.

Q. In connection with your work, have you ever seen any of the tissue or the skin immediately over that artery that is discolored and appears to be scarred?

A. Yes, I have seen it on numerous occasions.

Q. In connection with your work and in connection with addicts, have you noticed any fresh pinprick marks, that is, where there is a bloody scab over a small hole in that vicinity of the artery?

Mr. Marcus: Just a minute, please. Now, your Honor, I permitted the questioning to go on, as I am a bit in the dark as to the purpose of it, but there is no charge here of [fol. 27] the use of narcotics; the charge is possession. I object to the questions on the ground that they are incompetent, irrelevant, and immaterial.

Mr. Carr: We submit, if the Court please, that if there was an addition it would be evidence which the court might consider in connection with the possession.

Mr. Marcus: He is not charged with addiction, and I do not believe that the court should or ought to consider the fact that he might be a user of narcotics to support the charge of possession at this time. He might have taken narcotics on many occasions previously, but that would not tend to prove the issues in this case as to whether or not he was charged and had in his possession narcotics in violation of the state narcotics law.

Mr. Carr: Well, the conclusion, if the Court please, would seem to me that if the person accused were an addict, it would be corroborative of the charge of possession.

Mr. Marcus: Not necessarily so.

The Court: I will overrule the objection.

Mr. Marcus: Your Honor, for the purpose of the record, at this time—I didn't make the objection because I could not anticipate the answers to the questions propounded. May the record show and will counsel stipulate with me, that I reserve the objections to the introduction of testimony respecting this stomach-pumping affray until the close of the witness' testimony?

[fol. 28] The Court: All right. If you want to make a motion to strike at that time, we will be glad to entertain it.

Mr. Marcus: Thank you, your Honor.

The Court: The other objection is overruled.

Mr. Carr: May I have the question again, please?

(The question was read by the reporter.)

The Witness: I think they are mostly over the veins rather than the arteries.

By Mr. Carr:

Q. I stand corrected. If I substitute the word "vein" for "artery"?

A. Yes, I have noticed that on numerous occasions.

Q. Did you make an examination of the defendant's body?

A. Yes, I did, and—

Mr. Marcus: Just a minute. That answers the question, I submit, your Honor.

The Court: Yes.

Mr. Carr: All right.

By Mr. Carr:

Q. When was that examination made?

A. That examination was made by Dr. Meir in my presence.

Q. When was it?

A. That was approximately—oh, I should say 9:45 on the same day.

Q. Was that before or after the defendant's stomach was bailed out?

A. That was after.

[fol. 29] Q. Did you notice anything unusual about the defendant's body at that time?

Mr. Marcus: I object to that as being incompetent, irrelevant, and immaterial; no proper foundation; and the witness has not qualified as an expert to determine whether or not the pinprick, if he did find any, or any evidence that he has already laid as a foundation would tend to prove or disprove any issue involved in this case.

The Court: The objection is overruled. You may answer.

The Witness: Yes, I noticed a large mark over the defendant's vein.

By Mr. Carr:

Q. What part of his body?

A. It was on the upper elbow.

Q. On the inside or outside?

A. On the inside of his arm.

Q. Is that the type of a mark which is commonly found on the arm of an addict?

Mr. Marcus: I object to that as calling for the witness' conclusion; on the ground that it doesn't prove or disprove any issue in this case.

The Court: The objection is overruled. You may answer.

The Witness: Yes.

By Mr. Carr:

Q. Did you have any conversation with the defendant about this substance which had been recovered?

A. Yes, I did.

Q. Where?

[fol. 30] A. That conversation took place at—that was our old headquarters at 305 West Temple.

Q. Who was present at that conversation besides yourself and the defendant?

A. There was Lieutenant Huber and myself and Deputies Smith and Shelton.

Q. Did the defendant make some statements?

A. Yes, he did.

Q. Were they freely and voluntarily made?

A. Yes, they were.

Q. Any promises of reward or immunity extended to him?

A. No, there was not.

Q. Any duress or undue influence used upon him?

A. No.

Q. Relate the conversation.

Mr. Marcus: Just a minute. May it be stipulated, Mr. District Attorney, that I reserve the right to object and to strike the answer?

The Court: You better make the objection now, and then later on you can make a motion to strike if the ruling is adverse, if there seems to be some particular point additional that you want to emphasize.

Mr. Marcus: I had this in mind, your Honor: Instead of taking the witness on voir dire to establish the voluntariness of the purported confession, if it is to be a confession, that I will reserve that right until cross-examination. [fol. 31] nation.

The Court: All right.

Mr. Marcus: If it should appear to the court at the time that it was not voluntary, the court may then strike it.

The Court: That is all right.

The Witness: He stated that he had obtained these two capsules of heroin from a colored person on Sixth Street the previous night, that is, prior to this date of arrest; and he also stated that he had been using heroin for the past six months.

I asked him why he grabbed the capsules and placed them in his mouth; and he stated that he was out on bail on a narcotics charge—

Mr. Carr: Wait a minute. Hold that. I move that that be stricken on the ground it is immaterial.

The Court: Yes, we will let that go out.

By Mr. Carr:

Q. Excepting that portion that the court has ordered stricken out, was there anything else said in substance that you now recall?

A. Well, he did state that he grabbed the capsules and put them in his mouth.

Mr. Carr: I have here a small envelope. May it be marked People's Exhibit 1 for identification, your Honor?

The Court: Yes. People's Exhibit No. 1 for identification.

By Mr. Carr:

Q. In this envelope is a piece of cellophane paper in [fol. 32] which there appears to be some substance

wrapped. I will ask you to examine that and tell me whether or not you recognize it.

A. This looks the same as the two capsules that I placed in this envelope.

Mr. Marcus: I move the answer be stricken as non-responsive. "Do you recognize them?" He says they look the same.

The Court: No, the answer may stand. The motion is denied.

By Mr. Carr:

Q. Are those the capsules that you referred to that were recovered at the doctor's office by yourself?

Mr. Marcus: I submit, your Honor—

The Witness: Yes.

Mr. Marcus: Withdraw the objection.

By Mr. Carr:

Q. There appears a little white envelope from which I took those, "Elwood L. Schultz, M. D." Is that the envelope you placed them in?

A. Yes, this is the envelope I placed them in.

Mr. Carr: I have here a brown manila envelope, if the Court please, which contains another little brown-wrapped package and an eye dropper and a spoon and a little box which states on its label, "Empty gelatin capsules." May all of those objects be marked People's Exhibit No. 2 for identification?

[fol. 33] The Court: Yes. People's Exhibit No. 2 for identification.

By Mr. Carr:

Q. I direct your attention to Exhibit No. 2 for identification. Did you ever see those before?

A. Yes. These were handed to me by Deputy Shelton when I returned to the residence of the defendant Rochin.

Q. When Exhibit No. 2 was handed to you by Deputy Shelton, was that at the room where you first had seen the defendant?

A. Yes.

Q. Was the defendant with you when Shelton handed them to you?

A. Yes, he was there.

Q. Did Shelton say anything to you when he turned them over to you?

A. Yes, he stated—

Mr. Marcus: Just a minute. I submit it has been answered.

Mr. Carr: All right.

By Mr. Carr:

Q. What did he say?

Mr. Marcus: I object to that as no proper foundation; incompetent, irrelevant, and immaterial; what the one officer said to the other one.

The Court: Well, was the defendant present or not?

The Witness: The defendant was present.

Mr. Marcus: The defendant was present but the conversation between the two officers would be of no consequence. It doesn't tend to prove or disprove any of the issues in the case, their conversation.

Mr. Carr: If it is in the nature of an accusatory statement to which the defendant made no reply, the court can consider the defendant's action in the face of an accusatory statement.

Mr. Marcus: The Supreme Court has already held, of recent origin, the fact that a defendant may stand mute in the presence of an accusatory statement and not make any reply thereto is not any evidence against him whatsoever. Furthermore, this goes beyond that. This is not an accusatory statement if it is to be used as such against the defendant, or directed to him, so he would be under no obligation to reply, if that is to be considered as evidence at all.

Mr. Carr: Your Honor, much as I would like to see the Honorable Turney Fox on the United States Supreme Court, still you are in the state court, Judge, and I don't believe their holding is binding upon us.

Mr. Marcus: It is a comment upon what the Supreme Court of the United states thinks, and I believe that your

Honor would be interested in what the Supreme Court of the United States says with respect to that issue. We will come to some other issues later, but as to that matter I believe that the court would be interested in it.

[fol. 35] The Court: I am going to overrule the objection.

You may answer the question.

By Mr. Carr:

Q. The question was, what did Officer Shelton say to you?

A. He stated that he had found these capsules containing the white residue scattered around the room of the defendant Rochin.

Q. Was there anything said about the spoon, the eye dropper, and that little package of powder?

Mr. Marcus: Now, your Honor, I submit with respect to that—

The Court: That is subject to the same objection.

Mr. Marcus: Subject to the same objection.

The Court: Yes, it should be, and the same ruling. In other words, I do not want you to waive any point by not making or repeating your objection. It should go to this particular line of questioning in its entirety.

Mr. Marcus: I want to move at this time to strike the answer with respect to the conversation on the ground that it is not an accusatory statement at all.

Mr. Carr: Well, I haven't completed it yet.

Mr. Marcus: I understood the conversation was complete.

The Court: That is not all the conversation, I guess, and we will reserve that and you can renew that motion as soon as he has concluded whatever was said or claimed to have been said there.

[fol. 36] The Witness: He stated that he found the bag containing the white powder in the dresser drawer of the room of Rochin, and he stated that he had found the two eye droppers and the blackened spoon on this small end table that was by the bed of Antonio Rochin.

By Mr. Carr:

Q. Did the defendant say anything?

A. He did not say anything.

Q. Was he in such position that he could hear this statement of Officer Shelton to you?

Mr. Marcus: I submit, your Honor, that would call for the witness' conclusion.

Mr. Carr: Well, I will withdraw the question.

By Mr. Carr:

Q. How close to you and Shelton was the defendant at the time that Shelton made this statement?

Mr. Marcus: I object to that as being immaterial, in view of the conversation.

The Court: The objection is overruled.

The Witness: He was approximately one foot from me.

Mr. Marcus: Now, at this time I move to strike the conversation between the two officers as being incompetent, irrelevant, and immaterial; and having no bearing on any issue in this case; as not being accusatory statements at all; and not binding upon this defendant.

The Court: Anything you want to say, Mr. Carr?

Mr. Carr: It shows—may I ask your Honor to reserve the ruling on that? I think that in asking a few more [fols. 37] questions on that I can show your Honor the materiality of these objects passing in the presence of the defendant and this conversation.

The Court: All right.

Mr. Carr: So far, all your Honor knows is that an eye dropper or two and a spoon and some capsules were passed.

The Court: All right. We will withhold the ruling for the time being. Don't let me overlook the matter of ruling on it, because it must be ruled upon.

By Mr. Carr:

Q. Mr. Jones, in your experience in connection with addicts and narcotics do you know what eye droppers are used for by persons addicted to the use of narcotics?

Mr. Marcus: I object to that as being immaterial, your Honor; calling for the conclusion of this witness; no bear-

ing upon any issue involved in this case, the charge being possession.

The Court: The objection is overruled. You may answer, Mr. Jones.

The Witness: Yes.

By Mr. Carr:

Q. What is that use?

A. The eye droppers are used for injecting a narcotic into the veins of the addict.

Mr. Marcus: I move that the answer be stricken on the ground that it is not responsive and has no bearing upon any issue in this case, and no proper foundation was laid for the introduction of the statement of the witness at [fol. 38] this time.

The Court: I was just wondering about that last point, Mr. Carr. In other words, the nature of his answer looks to me like it would almost require an operation to make use of an eye dropper for the purpose of injecting into the veins.

Mr. Carr: Well, you are a little bit ahead of me. May I ask that you reserve the ruling on that one, too?

Mr. Marcus: We are going to have a record full here by the time we finish with this witness.

Mr. Carr: You will be able to watch your record all right. I have full confidence in you, Mr. Marcus.

Mr. Marcus: My memory isn't so good today.

The Court: All right. Go ahead, please.

By Mr. Carr:

Q. How is the eye dropper used to inject a substance into the veins?

Mr. Marcus: Your Honor, I object to the question. In the first place, it is a hypothesis upon a matter about which there is no evidence at this time to predicate the question. In other words, if he is going to ask a hypothetical question, he must have the evidence in the record upon which he can base his hypothesis. That is elemental in many of these malpractice cases. You ask a doctor a hypothetical question, you have got to have the evidence in the record; but to pick up an old, dirty spoon—and I would like to

have your Honor examine this spoon although it is not yet in evidence—to have him predicate a hypothetical question [fol. 39] and an expert hypothetical question to this witness on the ground that this eye dropper and this dirty spoon here would in some way tend to prove or disprove an issue involved in this case, I submit, your Honor, there is no proper foundation yet and it calls for this witness' conclusion.

Mr. Carr: We submit, if the Court please, that if permitted to complete our questioning of this witness we will show that the Exhibit No. 2 for identification is part of the paraphernalia used by a person addicted to the use of narcotics, particularly narcotics of the opiate group which require injection into the blood stream.

Mr. Marcus: There is not one word of evidence yet in this record to show that this man is an addict, so how could he predicate a hypothetical question on what some addict might use or might not use, and what instruments he might use to accomplish his use of narcotics?

The Court: Well, you are trying to show, in other words, first of all what the practice is among people who do use this type of narcotic?

Mr. Carr: Yes, sir, and we expect to prove that the eye dropper and the spoon and the little package of powder and the capsules are paraphernalia of addicts, or part of the paraphernalia of addicts.

Mr. Marcus: Without admitting it, but only assuming it for the purpose of argument that they do, how does it affect any issue in this case and how does it affect this defendant? In the first place, there is no proof that he [fol. 40] is an addict; in the second place, there is no proof that he used it; and in the third place no proof that they saw him use it. What some other person might do has no bearing on the issue in this case.

Mr. Carr: We will go back to the original premise, if the Court please. I stated to your Honor that the fact that a possessor was an addict is corroborative of the evidence of possession.

Mr. Marcus: Your Honor, that is the reason I made the objection in the original instance to his testimony with respect to it, because I knew we would get off afield in this case, and we are; and that is just the extent that we

are going to, what an addict might use when he has an eye dropper in his possession if he uses it for that. But how that proves any issue in this case, is beyond me to determine.

The Court: I will overrule the objection.

You may answer. Do you want the question read back to you, or do you have it in mind?

The Witness: I wish you would read the question.

The Court: Will you read it, please?

(The question was read by the reporter.)

The Witness: A hypodermic needle is fixed onto the end of the dripper and the solution is squeezed in, as it were, by pressing on the bulb.

Mr. Marcus: I move that the answer be stricken as non-[fol. 41] responsive. Apparently there is some other instrument that has to be attached to an eye dropper. I presume your Honor will take judicial cognizance that an eye dropper itself, as here before the court, cannot, or at least so far as this witness is concerned, according to his testimony, is not used by an addict. He has interpolated by saying that some hypodermic syringe—I believe was the term used—is attached to it.

Mr. Carr: No, needle.

Mr. Marcus: A hypodermic needle.

Mr. Carr: Is attached to that.

Mr. Marcus: Is attached to something. I submit, your Honor, we are going very far afield now by picking up an eye dropper and saying, if you attach that to a hypodermic needle and use the pressure behind the hypodermic needle, that you can force it into the vein from that.

The Court: I believe he did not get that far, did he? He was merely getting into the hypodermic needle and syringe.

Mr. Marcus: I submit that the answer be read again to the court.

The Court: Will you read it, please?

(The answer was read by the reporter.)

The Court: Into what, Mr. Witness?

The Witness: Into the vein of the user.

Mr. Marcus: Now, your Honor, I move that the answer

be stricken as nonresponsive; assuming facts not in evidence.

[fol. 42] The Court: I just do not understand it. You will have to do it all over. I see that my three brothers-in-law that I have mentioned so many times in here in your presence, Mr. Carr, who are doctors, have neglected one phase of my medical and surgical education.

Mr. Carr: Judge, that isn't anything they would be able to brief you on. They use an entirely different procedure.

The Court: I see. All right. I thought I knew a great deal about a lot of these techniques, but I am stalled at the moment.

Mr. Carr: I trust that your Honor will always continue to have an open mind and learn.

The Court: I am still anxious to learn how things are done.

By Mr. Carr:

Q. Will you explain again what is done with an eye dropper and hypodermic needle, please?

The Court: This is still subject to your objection, Mr. Marcus.

The Witness: Well, the solution is first placed into the spoon, and there is usually a small piece of cotton put into the spoon, and then the solution is drawn up into the dripper.

By Mr. Carr:

Q. The eye dropper?

A. Into the eye dropper, yes. Then the hypodermic needle is affixed to the end of it.

[fol. 43] Q. Of the eye dropper?

A. Of the eye dropper.

Q. And then what?

A. And then the addict puts the solution into his vein.

Q. How does he get it in there?

The Court: How does he get into the vein to start with?

The Witness: He puts the needle into the vein. Then he presses the bulb.

The Court: Now I can understand it. I did not want you to put the eye dropper into the vein.

Mr. Marcus: May my objection, your Honor, go to this line of questioning and answers?

The Court: Yes. That is quite proper; upon all the grounds you have stated.

Mr. Marcus: Yes, your Honor.

By Mr. Carr: •

Q. Everything you have testified to here occurred in the County of Los Angeles, State of California?

A. Yes.

Mr. Carr: Cross-examine.

Cross-examination.

By Mr. Marcus:

Q. This was a dwelling house that you entered, was it?

A. Yes.

Q. Together with two officers?

A. Yes.

[fol. 44]. Q. Did you see any people as you entered the dwelling?

A. No, I did not.

Mr. Marcus: Mrs. Rochin, stand up, please.

(Mrs. Rochin stands.)

By Mr. Marcus:

Q. Did you see this lady (indicating)?

A. I saw her as we left the dwelling. However, I did not see her, going up.

Q. Did you see anybody else in the residence at the time?

A. Yes. There was a small boy.

Mr. Marcus: You may sit down, Mrs. Rochin.

By Mr. Marcus:

Q. Did you ask this lady her name?

A. No, I did not.

Q. Did you ask the little boy's name?

A. He stated that he was the brother of Antonio Rochin. I didn't ask him.

Q. Were there any other people in the house at the time that you entered?

A. That is all I recall, sir.

Q. Did you determine who the lady was during your stay there?

A. Antonio Rochin stated that it was his mother.

Q. That was in some conversation that you had with him?

A. Yes.

Q. You immediately went upstairs, did you?

A. Yes.

[fol. 45] Q. How did you get into the house?

A. The door to the stairway was open.

Q. Well, you broke the door open, did you not?

A. No.

Q. Did you force the door open?

A. Not the downstairs door. There was a door to Rochin's room that had a small hook on it.

Q. Did you force that open?

A. Yes.

Q. You say "Rochin's room." You mean the room that Rochin occupied?

A. Well, the room that Rochin occupied, yes.

Q. In your conversations with Rochin during your travels that evening, did he tell you that he and his mother and brother and fiancée lived in the house?

A. I don't recall him stating that all of them lived in the house, no.

Q. You say you came into the room and you spied a couple of capsules on a table, is that right?

A. Yes.

Q. And you asked him concerning those capsules?

A. Yes.

Q. What did you say to him at the time?

A. I asked him whose they were.

Q. What did he say?

A. He reached over and grabbed them and placed them in [fol. 46] his mouth.

Q. No; what did he say?

A. He didn't say anything.

Q. Did you ask him anything else besides whose they were?

A. No, I don't recall asking him anything else.

Q. Did you have any other conversation with him at that time?

A. I don't recall any at this time.

Q. How large was the room?

A. Oh, approximately 10 by 10 feet, I would say.

Q. Take those two capsules out of the package, please.

A. (Witness complies.)

Q. What was the condition of the capsules when you saw them?

A. They were wrapped in cellophane.

Q. How large were the capsules?

A. Oh, I should say approximately three-eighths of an inch long.

Q. You were asked on direct examination if these were the capsules you saw on the table. Do you remember that?

A. Yes.

Q. And your reply was that they appeared to be, is that correct?

A. Yes.

Q. Are you absolutely able at this time to identify these [fol. 47] two capsules as being the ones that you saw on the table that evening or that day?

A. Yes, because I placed them in this envelope.

Q. That is when you took them out of the bucket. I am talking about the table now; when you first entered the apartment.

A. They appeared to look the same.

Q. Are you able to tell us definitely now that those were the capsules that you saw on the table?

A. No.

Q. Your answer is "No," is that correct?

A. That is right.

Q. What color cellophane were they wrapped in when you saw them on the table?

A. White, clear.

Q. These capsules now are not wrapped in white, are they? Just answer "Yes" or "No," please.

A. No.

Q. Is that right?

A. They have a little brownish tinge to them now.

Q. They are not wrapped in white cellophane now, are they?

A. Yes, they have white cellophane round them.

Q. Do you call that white?

A. It has a brownish tinge to it.

Q. They are not white, are they?

[fol. 48] A. However, I would say it was white.

Q. Who put that cellophane on them?

A. I don't know.

Q. Did you?

A. No, I didn't.

Q. Did you see anyone else put the brown cellophane on them?

A. They are in the exact condition that I recovered them from the pail; the white pail.

Q. I am not talking about the pail now, I am talking about the ones on the table. Who put the brown cellophane on them?

A. I don't know.

Q. The ones you saw on the table were white, is that correct?

A. They had a whitish color to them.

Q. Now, you say that he grabbed these two capsules off the table, is that correct?

A. Yes.

Q. These two objects here, wrapped in brown cellophane are not in capsule form, are they?

A. Yes, I would say—

Q. Well, just look at them.

A. No, they are not in capsule form. However, they are wrapped up, which makes them appear as though they were in capsule form.

[fol. 49] Q. Just answer the question. Are these in capsule form?

A. No.

Q. The two on the table were capsules that you have testified to?

A. They looked like capsules.

Q. Were they capsules?

A. They looked like it.

Q. Do these look like capsules?

A. No, they don't.

Q. Then they don't look like the ones that were on the table?

A. They look like the ones on the table.

Q. You mean to say that these two objects appear to look like capsules?

A. Yes, when they were in this envelope or large piece of cellophane which they were wrapped up in.

Q. I am asking you if the two capsules that you saw on the table—you said there were two capsules on the table. They weren't wrapped at the time, were they?

A. They were wrapped in this large piece of cellophane.

Q. On the table?

A. On the table.

Q. Now, wrap them just the way they were on the table.

A. I don't know exactly the way they were on the table.

Q. You saw them, didn't you?

[fol. 50] A. I saw them.

Q. Then you can describe how they were wrapped, can't you?

A. They were wrapped in the cellophane.

Q. What is the closest you came to those two capsules that were on the table?

A. Oh, approximately two feet.

Q. You would say a distance of approximately here, indicating this rostrum, from where you are?

A. Yes.

Q. Can you tell if there are two capsules in there?

A. The cellophane was in a much clearer—

Q. Please answer the question.

A. I can't now, but the cellophane was different than it is now.

Q. It was a different cellophane?

A. It is the same cellophane, but it wasn't crumpled as it is now.

Q. Can you see two capsules in there now?

A. No, I can't.

Q. Now, take them closer to you, a foot from you. Can you tell that there are two objects in there?

A. No, I can't, because the cellophane isn't in the same condition as it was.

Q. All right. Then you saw him grab the entire package, did you?

[fol. 51] A. Yes.

Q. And put it in his mouth?

A. He did, yes.

Q. And you saw, as you entered the room, two capsules on the table?

A. I didn't say as I entered the room. I say I walked over to the defendant, he was seated on the bed; and at that time I noticed two capsules on a small table.

Q. You noticed two small capsules?

A. Yes.

Q. But they were wrapped in a cellophane?

A. They were wrapped in a clear cellophane. The cellophane wasn't in the same condition as it is now.

Q. Do you know what a capsule is?

A. Yes, I do.

Q. Tell the court what you think a capsule is.

A. It is a gelatin capsule. It is a container.

Q. Is that what you saw on the table?

A. That is what it appeared to be.

Q. Is that what you saw on the table?

A. They appeared to look like capsules.

Q. All right. Now, do you see anything wrapped in gelatin that I am showing you now?

A. No, they are not wrapped in gelatin.

Q. All right. Now, after you saw the defendant, Mr. Rochin, put these two objects in his mouth—you were [fol. 52] present there, as I understand it, with Officers Shelton and Smith, weren't you?

A. Yes.

Q. You attempted to eradicate those from his mouth, did you not?

A. Yes.

Q. You both, or all three of you, jumped upon him at that moment, did you not?

A. Yes.

Q. And you grabbed him by the throat, did you not?

A. Yes.

Q. And you began to squeeze his throat, is that correct?

A. Yes.

Q. In an effort to eject the two objects from his mouth, is that correct?

A. Yes.

Q. And you applied force to his throat, did you not?

A. We tried to get the capsules from his mouth.

Q. I don't care what you tried to do. Did you apply force to his throat?

A. Yes, I believe that some force was applied to his throat.

Q. And the force you believed that was necessary to eject the capsules from his throat or mouth at the time, did you not?

[fol. 53] A. Yes.

Q. And he began to scream, did he not?

A. No, he didn't scream.

Q. Did he holler?

A. He hollered a little bit, yes.

Q. Hollered a little bit. What did he say when he hollered?

A. I don't recall.

Q. Did he say, "You are choking me to death"?

A. No, I didn't hear that.

Q. Did you hear him say anything?

A. No, I don't recall what he said at this time.

Q. Then you knocked him down on the floor, didn't you?

A. No, we did not.

Q. Did you push him down on the floor?

A. No.

Q. Did you stamp on him?

A. No.

Q. Did you kick him?

A. No.

Q. What other force did you use besides squeezing his neck?

A. That is all the force we used.

Q. The six of you had your hands around his throat at the time, didn't you?

A. The six of us?

[fol. 54] Q. Three of you, six hands.

A. I don't know whether it was all three of us on him.

Q. Well, all three of you were trying to get the capsules from him at the time?

A. Yes, that is right.

Q. And all three of you were at him and at his throat to get the capsules out of his mouth, were you not?

A. Yes.

Q. When did you put the handcuffs on him?

Well, let me withdraw that question.

While you were up in the room there, you placed handcuffs on him, did you not?

A. Yes.

Q. Then you began again to get those capsules, did you not?

A. No.

Q. He was fighting back at you at the time, wasn't he?

A. Yes, he was putting up a little restraint; yes.

Q. A little what?

A. Restraint.

Q. Restraint from an attempt to get you off his neck, wasn't he?

A. Yes.

Q. And in an attempt to stop you from using the force that you were using to get the capsules out of his throat or wherever he had them?

[fol. 55] A. Yes.

Q. You began to open his mouth, didn't you?

A. I tried to.

Q. You put your fingers into his mouth, didn't you?

A. Yes.

Q. And you put your hand into his mouth, too, didn't you?

A. No.

Q. How far did your fingers get into his mouth?

A. Not very far.

Q. How far?

A. I don't recall.

Q. You put all your fingers in his mouth at the time, didn't you?

A. I did not.

Q. And you ran your fingers around in his mouth, didn't you?

A. No.

Q. What did your fingers do in his mouth?

A. I tried to open his mouth.

Q. What were the other officers doing at the time that you had your fingers in his mouth?

A. I don't recall what they were doing.

Q. He had the handcuffs on at the time, too, didn't he?

A. No, he did not.

[fol. 56] Q. You put the handcuffs on him at that time?

A. No, we put the handcuffs on him later.

Q. Then you began to work him over again, didn't you?

A. No, that isn't the truth.

Q. You put the handcuffs on him in the room?

A. Yes.

Q. He told you he didn't have any capsules, didn't he?

A. He stated that he had thrown the capsules under the bed.

Q. And you looked under the bed?

A. Yes.

Q. You didn't find any capsules?

A. No.

Q. Then you went after him again, then, didn't you?

A. No.

Q. Did you ever have him on the floor?

A. No.

Q. Wasn't Miss Hernandez there at the time when this was going on?

A. Yes, I believe she was.

Q. Didn't she jump on your back and try to pull you off of him?

A. No.

Q. Did she push any of you officers away?

A. Not that I recall.

Q. Didn't she tell you that, "You are going to choke [fol. 57] him to death"?

A. No, I don't recall her saying that.

Q. You don't deny that she might have made that statement?

A. She might have said it. I don't know.

Q. Did his mother come upstairs?

A. I didn't see her upstairs.

Q. Didn't you tell him at the time, "We will choke it out of you unless you tell us where it is"?

A. No, I did not say that.

Q. Or words to that effect?

A. No.

Q. Did you say anything to him at the time that you were attempting—the three of you had your hands on his throat and you had your ~~hand~~ in his mouth—about these capsules? What did you say to him then?

A. I don't recall saying anything to him.

Q. Did anyone else say anything in your presence?

A. I don't recall any conversation at that time.

Q. Did you say anything to him at all during the time that you were attempting to eject these capsules from his mouth or throat?

A. I don't recall any conversation.

Q. Did you tell him to tell you where they were?

A. No, I did not. I knew where they were.

Q. He told you they were under the bed?

[fol. 58] A. Yes.

Q. You looked under the bed?

A. Yes.

Q. You didn't find them?

A. No.

Q. You didn't know where they were then, did you?

A. Yes.

Q. Why did you look under the bed then?

A. Because he told us where they were.

Q. I thought you said you knew where they were.

A. Well, I did know where they were.

Q. What did you look under the bed for?

A. Because he said they were under the bed. There might have been some more narcotics under the bed.

Q. You say you knew where the narcotics were.

A. Yes.

Q. And you knew they were in his mouth or throat or stomach, and still you looked under the bed?

A. Well, he said they were under the bed.

Q. You asked him, didn't you, where he had thrown them or what he had done with them?

A. No, I did not.

Q. And he told you they were under the bed?

A. No, he did not.

Q. And you looked under the bed.

A. I looked under the bed, yes.

[fol. 59] Q. Now, Officer, didn't you tell him at the time, that if he did not tell you where they were you would take him there and take it out of him with a pump?

A. No, I did not make that statement in the room there.

Q. Did you ever tell him that you were going to pump it out of him?

A. Yes. On the way to the doctor's office he asked where we were going, and I said we were going to pump his stomach.

Q. Now, you had quite a struggle in that room, didn't you?

A. Well, I don't recall it as quite a struggle.

Q. Well, you testified on direct examination you had a struggle in the room.

A. Yes, I had a struggle; yes.

Q. Who was the struggle with?

A. It was with the defendant.

Q. Who was he struggling with?

A. I was trying to recover the capsules.

Q. Who was he struggling with?

A. He was struggling with the other two officers and myself.

Q. The three of you and Rochin, is that correct?

A. Yes.

Q. Then you took him downstairs, is that correct?

[fol. 60] A. Yes.

Q. He had his handcuffs on at that time?

A. Yes.

Q. He told you he didn't want to go to the hospital, didn't he?

A. No, he did not state that; no.

Q. When you put him in the car and told him you were going to pump his stomach and you were going to take him to the doctor, he told you he did not want to go; didn't he?

A. No. He stated that the capsules he had thrown out. He said, "You won't find any capsules in my stomach," he said, "I threw them on the sidewalk."

Q. You told him then, "We will find out whether they are in your stomach and I am going to take you to the doctor and have it pumped"?

A. Yes.

Q. And he said, "I don't want to go to the doctor," didn't he?

A. He didn't offer any objection.

Q. Didn't you strap him down to the operating table in the hospital?

A. No, I did not.

Q. Who did, then?

A. I don't know.

Q. You were there when he was strapped, weren't you?

A. I believe there was one strap put around his middle. [fol. 61] However, there wasn't any other straps used.

Q. Who put the straps on him, or the strap, that you saw?

A. I believe it was a doctor's assistant.

Q. Didn't you hold him on the table?

A. No, I did not.

Q. Did any of the other officers hold him on the table?

A. No. I took him down there by myself.

Q. You had handcuffs on him at the time?

A. Yes, the handcuffs were left on him.

Q. The handcuffs were on him when he was lying on the table?

A. Yes.

Q. Who pushed him or put him on that operating table?

A. He got on the table himself.

Q. You didn't push him on there?

A. No.

Q. Didn't he tell you, "I don't want any straps on me"?

A. I don't recall him stating that.

Q. Now, who told the doctor to put the tube down this man's throat?

A. I asked the doctor to pump his stomach.

Q. What did Rochin say?

A. He didn't say anything.

[fol. 62] Q. Did he tell you at the time he didn't want any tubes down his throat?

A. No, he didn't state that.

Q. Did you talk to him all the way from his home to the hospital?

A. No, I did not.

Q. You had no conversation with him at all?

A. Oh, yes, I had conversation with him; but I didn't talk to him all the time.

Q. Didn't you tell him on the way to the hospital, "We are going to pump your stomach, we are going to get the evidence on you, no matter how"?

A. Oh, no, I did not state that.

Q. Did you tell him what they were going to do to him at the hospital?

A. Yes. I said that they were going to pump his stomach.

Q. Did you tell him how they were going to pump it?

A. No.

Q. You say you took him into the operating room, didn't you?

A. Yes.

Q. It was an operating table there, wasn't it?

A. Yes.

Q. This was a doctor's operating room?

A. Well, I am not familiar enough with the hospital [fol. 63] to know whether that is an operating room or not.

Q. Well, you know what an operating room looks like, don't you?

A. There was a table there for patients to lay down on.

Q. Haven't you been to this hospital before?

A. Yes, I have been there before.

Q. You have taken other people there to have their stomachs pumped, haven't you?

A. Yes.

Q. How many times before?

Mr. Carr: I object to that on the ground it is immaterial.

Mr. Marcus: It shows the course of conduct here, your Honor.

Mr. Carr: Sure. So he pumped the defendant's stomach; there is his conduct.

The Court: I do not see that it is material as to what has happened to other ones. The objection is sustained to that.

Mr. Marcus: It goes to the question as to his knowledge of that operating room, and that is the point, your Honor.

The Court: Well, there is not any question but what the defendant was there and he had at least one strap around him and they pumped his stomach.

By Mr. Marcus: —

[fol. 64] Q. Did you assist the doctor in any way?

A. No, I did not.

Q. How long was the tube that they inserted down his throat?

A. I don't recall exactly. I would say it was approximately a foot.

Q. About a foot long?

A. Yes.

Q. What was it made of?

A. Rubber.

Q. How wide was it?

The Court: You mean what is its diameter?

Mr. Marcus: The diameter.

By Mr. Marcus:

Q. Approximately how large was the diameter?

A. Oh, I would say it was a quarter of an inch, perhaps a little larger.

Q. Before that tube went down his throat, is it not a fact that Mr. Rochin said he did not want that tube in his mouth or in his stomach?

A. No, I didn't hear him make that statement.

Q. You were holding his head, weren't you?

A. I was not.

Q. Was anyone else holding his head there?

A. No.

Q. Was he lying quietly there on the table?

[fol. 65] A. He was, yes.

Q. Did you tell the doctor to put that tube down his throat?

A. I asked the doctor to pump his stomach.

Q. Pump his stomach?

A. Yes.

Q. Did Rochin tell the doctor to pump his stomach?

A. No, I didn't hear him.

Q. He was objecting to it at the time, wasn't he?

A. No, I didn't hear him object.

Q. You didn't hear him say anything?

A. Not in regards to having his stomach pumped.

Q. In regard to anything, did you hear him say anything while he was lying there on the table?

A. I don't recall any of the conversation at this time.

Q. Well, let me refresh your memory. Didn't he say, "You are choking me to death, don't put that thing down my throat"?

A. No, I didn't hear that conversation.

Q. Did you hear him say that, though?

A. No.

Q. Did you hear him say anything about not putting that tube down his throat?

A. No, I didn't.

Q. Was he struggling at all?

[fol. 66] A. No, he was not.

Q. Did he lie there quietly?

A. Yes, he did.

Q. What was the purpose of putting the strap around him, then?

A. I don't know, unless it is the usual procedure.

Q. You know as well as I do, don't you, that he was struggling there and they put the strap around him to put that down his throat?

A. I was there. I know that he wasn't struggling.

Q. Not at all?

A. No.

Q. He made no statement at all?

A. I don't recall any of the statements he made.

Q. Didn't they strap his arms to his body with the handcuffs on him, with that one strap?

A. I don't believe so. I think the strap was just around his body.

Q. But you are not sure about that?

A. No, I am not positive.

Q. They injected water into that tube in his stomach, did they not?

A. Yes.

Q. How did the liquid come out of his stomach?

A. It was expelled all at once.

The Court: That is, in sort of a vomiting fashion?
[fol. 67] The Witness: Yes.

By Mr. Marcus:

Q. How much water did they put into him?

A. I don't know.

Q. What else did they use besides water?

A. I don't know. It was a white solution. I don't know.

Q. It had a chemical in it too, did it not?

A. I don't know.

Q. It wasn't water, though, was it?

A. I don't know what they put into the solution.

Q. Didn't you ask the doctor what they put into the solution?

A. No.

Q. They put a solution into the liquid to cause him to vomit, didn't they?

A. I don't know.

Q. Well, don't you know what they subject these prisoners that are under your jurisdiction to?

A. Well, I have confidence in Dr. Meir.

Q. Never mind about your confidence. Don't you know what they put in the solution?

Mr. Carr: I object to that on the ground it has been asked and answered, and it is argumentative.

The Court: Well, do you know, Officer, or not?

The Witness: I understand it is a saline solution. How-
[fol. 68] ever, I don't know, myself.

By Mr. Marcus:

Q. Was the tube inserted in his throat at the time the liquid came out?

A. Yes.

Q. Did it come through the tube?

A. No. It was expelled through the mouth.

Q. While the tube was still in his throat?

A. Yes, I believe it was.

Q. Didn't he begin to scream and holler at that time, "You are choking me"?

A. No, he did not.

Q. Did he say anything at the time?

A. No, he did not.

Q. How much did he expel?

A. Oh, there were approximately two inches of a white solution in the pail.

Q. You say that these two objects you found in the pail?

A. The two objects were wrapped in this larger piece of cellophane.

Q. You found them all in the pail?

A. They were in the pail, yes.

Q. Did you see them come out of his mouth?

A. No, I could not see them come out of his mouth.

Q. How long did it take you to go from his home to that hospital?

[fol. 69] A. I would say approximately 20 minutes.

Q. Who is Dr. Meir? What is his first name?

A. Dr. Edward Meir.

Q. Do you know whether or not he is a duly licensed physician and surgeon, admitted to practice in the State of California?

Mr. Carr: We object to that on the ground it is immaterial.

Mr. Marcus: This would be something if he took him to somebody that is a chiropractor.

The Witness: He is an M.D.

By Mr. Marcus:

Q. How do you know that?

A. One reason I know is he operated on my neck.

Q. That is the only reason that you know?

A. And he told me that he was an M.D.

Q. Did you ever see his credentials or his diplomas?

A. No, I never have.

Q. Did you ever see his license where he was admitted to practice in the State of California?

A. No, I have not.

Q. Who is your superior officer?

Mr. Carr: We object to that on the ground it is immaterial.

Mr. Marcus: I want to find out where he got orders to take this prisoner to a pump station.

Mr. Carr: That is immaterial, if the Court please, even [fol. 70] if he did it on his own.

The Court: I will let him answer the question.
You may answer the question.

By Mr. Marcus:

Q. Who is your superior officer?

A. Lieutenant Huber.

Q. Did you ever receive any instructions from Lieutenant Huber or any superior officer to take this defendant and have his stomach pumped?

Mr. Carr: I am going to object to that, if the Court please, on the ground that it is immaterial in the first place; and in the second place, if he received such an order, it would be hearsay.

Mr. Marcus: It goes to the defense, your Honor.

Mr. Carr: The defense of what?

Mr. Marcus: I can't disclose it all at one time.

The Court: I will let him answer the question.

You may answer.

The Witness: Not as to this particular defendant, no.

By Mr. Marcus:

Q. As to all defendants?

Mr. Carr: We object to that on the ground it has been asked and answered. As to what anybody else is concerned with is immaterial.

Mr. Marcus: I raised that same objection, too, when it came to addicts.

Mr. Carr: He stated he had no direct orders insofar as this defendant was concerned.

[fol. 71] By Mr. Marcus:

Q. What are your orders with respect to the use of Dr. Meir to pump stomachs?

Mr. Carr: I am going to object to that on the grounds it is immaterial and calls for hearsay. We are confronted with the practice—

The Court: I think I will sustain that objection. What you want to find out, I take it, is as to whether or not there

is any practice or whether or not there are any standing orders as to what to do with a suspect who swallows something that is thought to be involved as a public offense. Isn't that what you are trying to get at?

Mr. Marcus: Right.

The Court: Now, are there any instructions on the general subject such as that? I think that is what counsel wants. If there are, you will say "Yes"; if there are not, say "No."

The Witness: I don't think there are any rules with regard to this stomach-pumping operation. It happens so very seldom that I don't know of any hard and set rule to it.

By Mr. Marcus:

Q. Officer, before you took this man to the pumping station at Dr. Meir's office, you had no knowledge of what the contents of these two capsules were, is that correct?

A. They looked like capsules of heroin.

Q. Now, show me where you see any evidence on these two capsules that they look like heroin. Now, show it to the [fol. 72] court, please.

Mr. Carr: They looked like what, sir?

Mr. Marcus: Looked like heroin. Lay them up there on the bench and tell me what would indicate to you that they were heroin.

The Witness: Because in a narcotics raid, narcotics are usually wrapped in this fashion or in capsule form.

By Mr. Marcus:

Q. Well, these are not in capsule form, are they?

A. Well, they are not commonly called caps, that is, the small gelatin capsules.

Q. But you had no knowledge concerning the contents of them, did you?

The Court: Well, you mean——

The Witness: Well——

Mr. Marcus: Wait just a minute.

The Court: Go ahead.

The Witness: I received a pretty strong deduction from the defendant when he placed them in his mouth and swallowed them.

By Mr. Marcus:

Q. Is that the extent of your knowledge concerning their contents, because he swallowed them? Just "Yes" or "No," please.

A. Well, and also the information that I had received about the defendant from other sources.

Q. Well, that is not evidence here, please. I am just [fol. 73] asking you whether or not you had any knowledge concerning the contents of those two objects before they were ejected from his stomach.

A. Well, I am not sure what they were. I wasn't positive what they were.

Q. You had no knowledge concerning their contents?

A. I wouldn't say I had no knowledge.

Q. Tell me, by looking at those objects, what you knew about their contents.

A. Well, I would deduce that they contained narcotics.

Q. Just by looking at them?

A. Not exactly by looking at them, but there would be a strong suspicion on my part that they did contain narcotics.

Q. Just by looking at them?

A. Yes.

Mr. Marcus: I think that is all at this time, your Honor.

The Court: Any redirect?

Mr. Carr: No redirect, your Honor.

The Court: You may be excused.

(Witness excused.)

The Court: Let's take the afternoon recess.

(Short recess taken.)

The Court: The record may show the defendant personally present and with his counsel.

You have another witness, Mr. Carr?

[fol. 74] Mr. Carr: Yes, sir. Mr. Crompton, please.

CLIFFORD C. CROMP, called as a witness on behalf of the People, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Clifford C. Crompt.

Direct examination.

By Mr. Carr:

Q. Mr. Crompt, what is your business or occupation?

A. I am a chemist, employed by the Criminological Laboratory of the Sheriff's Department.

Q. How long have you been a chemist?

A. For two years.

Q. What has been your study in that regard?

A. I studied chemistry for four years at the University of Southern California. Subsequently I have been employed by the Criminological Laboratory for a period of two years, during which time I have studied chemistry.

Q. During your employment at the Sheriff's Crime Lab, have you had occasion to examine questioned substances to determine what their content is?

A. I have.

Q. Your examinations—have you ever made them of questioned substances to determine whether or not they contained any narcotic, and particularly those of the opiate group?

[fol. 75] A. I have.

Q. Upon more than one occasion?

A. Yes, sir.

Q. Have you testified in court concerning those matters?

A. I have.

Q. On more than one occasion, sir?

A. Yes, sir.

Q. I direct your attention to Exhibit No. 1 for identification, these two substances here which previously were wrapped in cellophane paper. Have you ever seen those before?

A. Yes, I have.

Q. When did you first see them?

A. I saw them on the first day of July, 1949.

Q. Did you receive it from someone?

A. Yes, sir.

Q. From whom?

A. From Deputies Jones and Shelton of the Sheriff's narcotic detail.

Q. Was that Mr. Jones the deputy that preceded you on the witness stand?

A. He is.

Q. Did you make an examination of those two capsules?

A. I did.

Q. What did you determine the contents to be?

Mr. Marcus: I object to that as no proper foundation yet, [fol. 76], your Honor.

The Court: You mean as to his qualifications?

Mr. Marcus: As to his qualifications and as to the identification of these two objects.

The Court: No, I will have to overrule that objection as to both grounds.

You may answer.

The Witness: These small objects consist of parts of gelatin capsules containing a brownish powder. Each of the parts of the gelatin capsule are wrapped in a piece of cellophane. The brownish powder in each of the parts of the gelatin capsules contains the narcotic drug morphine, a derivative of opium.

Mr. Carr: For the purpose of the record, that was Exhibit No. 1.

By Mr. Carr:

Q: I direct your attention to this box entitled, "Empty gelatin capsules," a part of Exhibit No. 2 for identification. I will ask you if you examined the capsules contained therein. You can open it. It is sealed with Scotch tape.

A. (Witness complies.)

Q. You have opened that box and it contains—what are those objects that you took out of that box?

A. They appear to be empty gelatin capsules.

Q. Have you ever seen that before?

A. Yes, sir, I have.

[fol. 77] Q. Did you see those likewise on the first day of July, 1949?

A. I did.

Q. Did you receive those from Officer Jones?

A. Yes, sir.

Q. Did you examine those capsules—those capsules appear to be discolored somewhat. Did you examine the discoloration on the inside of the capsules or on the capsules?

A. I did.

Q. What did you determine that discoloration to be?

Mr. Marcus: Just a moment, please. I object to that on the ground there is no proper foundation.

The Court: The objection is overruled.

Mr. Marcus: And objected to on the further ground that it calls for this witness' conclusion. There is no basis here yet for the introduction of any expert testimony concerning the capsules. He testified they appeared to be empty capsules, and I submit, your Honor, for you to look at them and determine they are empty capsules.

Mr. Carr: They are empty, but we submit, if the Court please, that an examination will disclose to the court that they do not have the usual empty capsule color about them; that there appears to be a discoloration.

Mr. Marcus: Let's let the court examine them and determine that.

The Court: All right.

[fol. 78] Mr. Marcus: You can't examine something and form an opinion about nothing.

Mr. Carr: You would be surprised.

The Court: You maybe can form an opinion about the absence of something.

Mr. Marcus: That is correct. He has already testified to that, your Honor, and I submit that that is the basis of the objection. He testified that they are empty capsules.

Mr. Carr: I asked him about the discoloration in the capsule itself.

The Court: Well, I think I will let him testify as to whether or not there is a discoloration. He is perhaps more familiar with these things than I am.

Mr. Marcus: Your Honor, as to whether or not it contains a discoloration would not call for expert testimony. Your Honor can see it and so can I.

The Court: Well, what is your view, that there is a discoloration?

Mr. Marcus: I see none, and in view of his testimony that

they are empty capsules, it would make no difference what the color was.

The Court: I will let him answer the question as to whether or not there was any discoloration, first. Maybe you have covered that, but you better go back.

Mr. Carr: I will ask that question again.

By Mr. Carr:

Q. Mr. Crompt, have you upon any other occasions ever [fol. 79] seen empty gelatin capsules?

A. I have, many times.

Q. Those that appear there before you as part of Exhibit No. 2 for identification, are those similar in color to the empty capsules which you have seen?

Mr. Marcus: I object to that as assuming facts not in evidence. It does not call for expert testimony.

The Court: The objection is overruled.

The Witness: No, they do not appear exactly as unused empty capsules would.

By Mr. Carr:

Q. Did you—

Mr. Marcus: I move that the answer be stricken as calling for this witness' conclusion.

The Court: Well, that is not quite responsive, I am afraid. The answer may go out.

Read the question, Mr. Goebel.

You listen to the question.

Mr. Carr: Let me reframe the question, then, your Honor.

The Court: All right. The question goes out, too.

By Mr. Carr:

Q. Have you ever had occasion to see empty, unused gelatin capsules?

A. Yes, sir, I have.

Q. Are they the same or different from the color and the appearance of those empty capsules there before you?

Mr. Marcus: I object to that on the ground it is immaterial. It certainly cannot prove or disprove any issue [fol. 80] in this case as to what other capsules he might

have seen on other occasions. It would not prove any issue in this case.

Mr. Carr: It is a preliminary question.

The Court: It is for the purposes of determining, I take it, whether or not these appear in any different fashion or for any reason or cause have become colored.

Mr. Marcus: Your Honor can look at them. That doesn't call for expert testimony. I will hand them up to the court.

The Court: I took a look at them and I am not too familiar with what those capsules are supposed to look like in their original, unused and uncontaminated condition.

Mr. Marcus: May I hand this up to the court for the purpose of my objection, your Honor?

The Court: All right, sir.

Mr. Marcus: I will submit, your Honor, if you look at them—you put them under a microscope, if your Honor desires to—but to the eye there appears to be nothing in those capsules, they appear to be of natural color; and I would like to have the court's opinion regarding it.

The Court: Well, they are empty, that is one thing, as I sometimes say, that is crystal clear; but whether or not they have had anything in them previous to this or whether or not they are in any fashion changed in color from what they formerly were or what this type of capsule ordinarily is, I just do not know.

[fol. 81]. Mr. Marcus: Neither do I, your Honor, and that doesn't call for expert testimony. I will submit, your Honor, that maybe half a dozen manufacturers may make capsules, but it won't make any difference if there was any coloration. If these capsules are empty—and they are empty now—and those are in the same condition that he received them in, it would not prove any particular issue in this case.

The Court: What is your particular point in this, Mr. Carr?

Mr. Carr: Well, just by way of an offer of proof, in order that your Honor may rule on the matter, our contention is that, although they are empty in the general use of that particular word, yet there is a residue inside of the capsules which I anticipate this gentleman will testify he

examined and found to contain morphine, an opium derivative.

Mr. Marcus: That is just the point, your Honor. If those capsules are empty—they appear to be empty—and if he examined them and found some residue of morphine in them, that his testimony, to my mind, is absolutely valueless. The court has observed that they are empty, I have, too, and so has counsel; and he predicated his questions upon that very point. Now, you are certainly not going to examine and find something when there is nothing there.

The Court: Well, there might be some scrapings that could be drawn from them. I would not be prepared to say from my own personal examination of them.

[fol. 82] I will overrule the objection.

You may answer the question. Do you want it read, Mr. Crompton?

The Witness: Yes, I have lost track of it.

The Court: Will you read it, please?

(The question was read by the reporter.)

The Court: You may answer.

The Witness: They are different.

By Mr. Carr:

Q. Did you make any examination of those capsules to determine whether or not there was any foreign substance in them?

A. I did.

Q. Did you find any foreign substance?

Mr. Marcus: Just a moment. I ask to be permitted to take the witness on voir dire.

The Court: You may.

Voir dire examination.

By Mr. Marcus:

Q. You say these are empty capsules, are they not?

A. I said they appeared to be empty capsules. I didn't say they were empty.

Q. Now, do you see anything in these capsules?

A. I do.

Q. What do you see in them? For instance, pick out this one here. Do you see anything in that capsule?

A. Yes; I do.

[fol. 83] Q. Tell us what you see.

A. I see a stain or residue of some sort inside the capsule.

Q. With your naked eye?

A. With the naked eye, yes, sir.

Mr. Marcus: Now, I will submit to the court, and hand this capsule up, that this capsule contains absolutely nothing.

(Capsule examined by the court.)

The Court: Well, there is at least one or two places in which the transparency is somewhat lesser, two places in which the transparency is somewhat lesser than it is on the other portions of it. Now, whether that is something inside or outside, or whether it is caused by our handling it, I would not know. Beyond that I would not be able to state what it is that causes the slight spots, I will call it, or lack of transparency in comparison to the other portions of this capsule that I have mentioned. Now, that is as far as I will go.

Mr. Marcus: Now, will your Honor keep that one separate?

The Court: Yes.

By Mr. Marcus:

Q. I will show you this capsule and ask you whether or not you see any substance in the capsule. Just answer that "Yes" or "No."

A. Yes, I do.

Q. What substance do you see?

[fol. 84] A. I see a small amount of powdery residue in the capsule; very small and very fine.

Q. Powdery residue?

A. Yes.

Mr. Marcus: Now, I submit, your Honor, and hand this capsule to the court, that this capsule contains absolutely nothing.

(Capsule examined by the court.)

Mr. Marcus: There is, especially, no powdery residue.

The Court: The most I could observe from this is that it gives the impression of a dirty glass that has been standing around for some time, and gives the impression of, by comparison, maybe having accumulated a little dust. Now, that is a very rough and a very crude and perhaps inarticulate and maybe inexact way of describing that, but that is about as near as I can describe it.

By Mr. Marcus:

Q. I will hand you this capsule and ask you whether or not you see anything in that one.

A. There appears to be a little dust or powdery residue inside.

Q. Do you see powdery residue in that one?

A. And there is also a small amount of lint or fiber residue.

Q. Do you see any powdery residue?

A. Yes, a dusty residue and some stains on the inside, also.

[fol. 85] Q. Do you see any powder, is the question.

A. Yes.

Mr. Marcus: I hand this capsule to the court.

The Court: What are you trying to do, make an expert out of me?

Mr. Marcus: I submit, your Honor, that that contains absolutely no powder residue.

(The court examines capsule.)

The Court: This one kind of came apart a bit. All right, I have got this one back together.

Mr. Marcus: Did your Honor describe this for the purpose of the record?

The Court: There is on the outside of the rim of one end of it something that looks something like a thread, something of that kind; and the rest of the capsule seems to have what would be to me sort of a dirty appearance, kind of like the fog that accumulates on one's windshield sometimes, not over too long a period of time, but to give it a rather smudgy appearance.

By Mr. Marcus:

Q. I show you this capsule and ask you whether or not you see any powder residue in that capsule.

A. Yes, I do.

Q. What does that powder look like to you in this capsule and in the other capsules that you have examined?

A. It is composed of a white, dust-like affair with some stain on the inside of the capsule.

[fol. 86] Q. A white dust affair?

A. Yes.

Q. Now, will you point out to the court where you see a white dust affair in this capsule?

A. I will.

The Court: Suppose you put it up toward the glass here where there is more light, and maybe I can look at it in somewhat the same general view that you do.

Mr. Carr, do you want to get in on this?

Mr. Carr: I have seen them, your Honor. I am satisfied.

The Court: I never want to deprive either of counsel of full participation.

Hold it up between the light so I can see it.

The Witness: On the inside the capsule is stained, contains particles of white dust, that I can see.

By Mr. Marcus:

Q. White powdered dust?

A. Yes. In this large portion——

Q. Do you see white powdered dust there?

The Court: He started to say large something. He did not finish the sentence.

The Witness: In the large end of the capsule.

The Court: Thank you.

The Witness: And in the smaller end of the capsule there is also an amount of white powdery substance on this side. You can see it quite well. (indicating).

[fol. 87] The Court: Well, this is the small piece that I have now, is it not?

The Witness: Yes.

The Court: It has a stain and unclear or not entirely or completely transparent appearance, and it appears to be

on the inside that there is some kind of something that might be likened unto dirt or dust. I would not be able to describe it beyond that, I believe.

Let me see the other piece, please.

The Witness: Yes.

The Court: Well, generally speaking, the larger part of the capsule also contains dust or some other substance which, at least, gives it an unclean appearance and not as transparent as perhaps it normally would be if it was completely fresh and new and had not been exposed.

I will put the two back together.

By Mr. Marcus:

Q. Did you extract any of this so-called powdery substance from these capsules?

A. I did.

Q. Did you examine these capsules that the court has now observed and commented upon?

A. Today or before?

Q. Before.

A. Previously, yes, I have.

Q. What did you do?

A. I shook what substance appeared to be within them [fol. 88] into small amounts of chemical reagent that I was using to test them.

Q. How much did you shake out, if you did shake out anything?

A. It was a very small amount.

Q. Could you weigh it?

A. No.

Q. There wasn't enough to even weigh, was there?

A. There was not.

The Court: By the way, I have set this one in. Instead of putting it back together the way it should be, perhaps the long one into the small one, so that there is no actual cap over it; so I am the one that is responsible for the change in its condition.

By Mr. Marcus:

Q. Was there enough that you would say could be placed on a pin point?

A. More than that.

Q. How many pin points?

A. I don't know the exact dimensions of a pin point, so I couldn't say.

Q. You couldn't even weigh it?

A. I could not.

Q. It was that small?

A. It was a very small amount.

Q. How small will your scales weigh in the Crime Laboratory?

[fol. 89] A. Our scales will weigh to one milligram.

Q. There was not enough to even balance the scales at one milligram, was there?

A. There was not.

Q. Where is the portion that you tested?

A. It has been consumed in the analysis.

Q. You mean you destroyed it in the analysis?

A. That is correct.

Q. Well, where is the analysis that you made?

A. The solutions and reagents and things have been disposed of.

The Court: A little louder, Mr. Crompt.

The Witness: The solutions and reagents have been disposed of.

By Mr. Marcus:

Q. Now, if the agents destroyed it, you had nothing left; is that correct?

A. The reagents altered it, I should say; altered it. They did not destroy it.

Q. Where are the agents now?

A. The reagents?

Q. What did you do with them?

A. I poured them down the sink drain.

Q. You didn't save them for evidence?

A. No, sir, because they have no value as evidence.

Q. That is your opinion, sir, is it not?

A. It is not my opinion—it is my opinion. It is also a [fol. 90] fact, I should say.

Q. You dumped the test and the reagents down the sink?

A. Yes, sir.

Q. How much did you dump down the sink?

A. It was a very small amount.

Q. How much?

Mr. Carr: Is this still voir dire examination?

The Court: Well, I fear it has probably gone a little bit beyond that, but you might as well finish it as though it is cross-examination.

Mr. Carr: I am waiting for him to ask the one question, the \$64.00 question, Judge.

Mr. Marcus: Yes.

By Mr. Marcus:

Q. What reagents did you use?

A. What reagents?

Q. What reagents did you use?

A. I used Froehde's reagent.

Q. What is that?

A. It is a reagent composed of sulphuric acid and molybdc acid.

Q. How much of that did you use?

A. About one-tenth of a milliliter, or a cubic centimeter.

Q. Where did you pour that reagent?

A. During the test?

Q. During the test.

[fol. 91] A. In a small, white, so-called spot plate; a dish with many indentations, small indentations, on it; a glazed white porcelain dish.

Q. This particle that you say that you found that you couldn't even weigh on a scale, what did you do with it?

A. There were a number of particles which were shaken out.

Q. The number of particles all together could not be weighed on the scale, could they?

A. Not from one of the capsules alone.

Q. From all of them put together?

A. From all of them put together? Yes, I think they could.

Q. You think they could. Did you weigh them?

A. I did not.

Q. What did you do with them, the particles that you picked out of the capsules, as you say?

A. I shook the capsules into the reagent.

Q. Did the reagent destroy the contents of the capsule that you say you poured into that?

A. It altered it chemically. It did not destroy it.

Q. Now, as a matter of fact you couldn't get any reliable test from the amount that you had there, could you?

A. Yes, sir, I could.

Q. Now, you use that same receptacle to test all your chemicals, don't you; and all your narcotics?

[fol. 92] A. We have several of them. We use them all the time, yes, sir.

Q. You use them all the time?

A. Yes.

Q. You have had instances where you have poured a lot of narcotics in those receptacles, have you not?

A. We seldom pour a very large amount.

Q. Well, enough to make a test?

A. Yes.

Q. And a reliable test?

A. Enough to make a reliable test is not a very large amount.

Q. You have used that same receptacle on many, many previous occasions, haven't you?

A. I have, yes.

Q. And you used the same receptacle on this occasion?

A. That is correct.

Q. The amount was infinitesimal, wasn't it?

A. It was very small.

Q. What sort of other tests did you give it besides that?

A. I used a test, a general precipitant test for alkaloids.

Q. On this amount that you took out that you couldn't weigh on the scale?

A. Yes, sir.

[fol. 93] Q. How did you pick it up?

A. I didn't pick it up, sir.

Q. How did you get it into the test tube to make the precipitating test, if you didn't pick it up?

A. I used a small drop of water—a watch glass—and shook the capsule, the substance from the capsule into the small drop of water, and then tested the small drop of water.

Q. Then you did put it into a test tube, didn't you?

A. No, sir, not in a test tube.

Q. You took a drop of water to make the test?

A. Yes, sir.

Q. You consider that reliable?

A. I do.

Q. How many tests did you make with the substances that you took out of these supposed capsules?

A. Out of each of the capsules?

Q. Yes. How many tests did you make altogether?

A. I made two tests on the substance taken from each of the capsules.

Q. What did you do with the drop of water that you had?

A. I don't remember whether I dumped it—

Q. Did you pour it down the sink, too?

A. Whether I dumped it down the sink or whether it evaporated and I simply washed the dish thereafter.

Q. You mean it evaporated then and there while you [fol. 94] were performing the test?

A. No. It might have done so within a few minutes.

Q. Did you look at the spoon at the time?

A. I did.

Q. Did you subject this spoon to a test?

A. Yes, sir.

Q. Do you see anything in the spoon there?

A. Yes, I do.

Q. Is that the object that you performed the test upon that is on the spoon?

A. No, sir, it is not the entire substance that was on the spoon at the time.

Q. Was there something else on the spoon besides that?

A. Yes.

Q. What did you see?

A. There was more of a residue on the spoon.

Q. The spoon was in the same condition that it is now?

A. It was dry, but not in the same condition, no, sir. There was more of a white crusted residue about the spoon, the bowl of the spoon.

Q. And that you tested, too?

A. Yes, sir.

Q. Was there very much more residue on that spoon?

A. Not very much more, no.

Mr. Marcus: Now, I will submit, your Honor, that there is a discoloration on the spoon but there does not appear to [fol. 95] be any residue on that spoon.

Mr. Carr: Are we still on voir dire?

The Court: Well, as long as we all have a sense of humor about the legal procedure that is apparently being evolved and none of us are in any degree misled, perhaps it doesn't make too much difference as to the exactness of procedure.

Well, I have looked at it, that is, the spoon. I don't know whether there is any residue or not there. It has a different color down in the bottom as distinguished from around the sides. What has caused that or whether there is a lack of cleanness there around the edges of the discoloration or not, I am not sufficiently expert to accurately and with finality determine.

By Mr. Marcus:

Q. Do you see these two supposed capsules here?

A. I do.

Q. Is there anything on there to indicate that you examined them?

A. No. There are no markings on there to indicate that I examined them.

Q. How many examinations have you made of capsules of morphine?

A. Several hundred.

Q. Several hundred. And you have no identifying marks on these capsules, have you?

[fol. 96] A. Not on these, no, sir.

Q. And you don't know whether you made any test on those or not, do you?

A. They resemble the capsules I made tests on.

Q. Not whether they resemble them or not, I am asking you whether you do now state under oath that you remember making an examination of these capsules.

A. I don't know whether these are the same capsules or not.

Mr. Marcus: That is all.

The Court: That is all the voir dire?

Mr. Marcus: That is all the voir dire.

Direct examination (continued).

By Mr. Carr:

Q. Now, these two capsules that you examined and you testified you received from Officer Jones, how did they come to you, were they in any container?

A. Yes, sir, they were.

Q. In what?

A. They were in this small envelope marked "Elwood L. Shultz, M.D.," and were also—this small envelope was placed in this large envelope, Sheriff's office envelope.

Q. Exhibit No. 1 for identification. You examined two capsules that were handed to you by Mr. Jones that came in those?

A. That is right.

[fol. 97] Mr. Carr: I will ask the court to take judicial notice that the two capsules which were produced here and offered for identification as Exhibit No. 1 came out of this selfsame envelope described by the officer.

Mr. Marcus: That is not the point, counsel.

Mr. Carr: Certainly that is the point.

Mr. Marcus: The point is whether he knows he examined these two capsules.

Mr. Carr: They came in a certain container. It goes to the weight rather than the admissibility.

Mr. Marcus: No. The envelope might be admissible, but certainly not the contents as yet. I don't believe there is any foundation, but I am a little bit premature anyway, your Honor.

Mr. Carr: All right.

The Court: All right.

By Mr. Carr:

Q. Now, incidentally, on the eye dropper that is there, did you make an examination of the eye dropper?

A. Yes, I did.

Q. Did you find any foreign substance in the eye dropper?

A. Yes, sir.

Q. Did you examine the substance?

A. I did.

Q. What did you determine that substance to be?

Mr. Marcus: I object to that as having no proper foundation. [fol. 98]

The Court: The objection is overruled. Go ahead.

The Witness: There was a residue of the narcotic drug morphine or of its derivatives in the eye dropper.

By Mr. Carr:

Q. What did you find the residue in the spoon to be?

A. The residue in the spoon was of the narcotic drug morphine.

Q. What did you find the substance to be which you shook out of the capsules which are part of the Exhibit No. 2 for identification?

A. The substance in the capsules was either the narcotic drug morphine or one of its close derivatives.

Mr. Marcus: I move that be stricken as calling for the conclusion of the witness and nonresponsive.

The Court: The objection is overruled.

By Mr. Carr:

Q. Did you examine the substance contained in this part of Exhibit 2?

A. I did.

The Court: What are you referring to, so that you may identify it a little better?

Mr. Carr: The portion which has been identified as a little bag or envelope as part of Exhibit No. 2.

By Mr. Carr:

Q. What did you find that to be?

A. There was a whitish powder in the brown paper bag, which contained a reducing sugar similar to lactose or [fol. 99] milk sugar.

The Court: You will have to read that answer, please.

(The answer was read by the reporter.)

The Court: What is that used for?

The Witness: It is used for many things. It is part of a baby's formula.

The Court: Has it any relation to narcotics or the use thereof?

The Witness: It is one of the substances that is normally mixed with morphine or heroin.

Mr. Marcus: I submit that that calls for the witness' conclusion. There is no evidence here that it was mixed with anything.

The Court: I think I will strike out the question and the answer. Perhaps I had better let you gentlemen try the case, and I did not mean to get in on it by asking that question.

By Mr. Carr:

Q. Mr. Crompton, in your previous experience with examining narcotics, particularly those of the opium derivatives, have you found the presence of lactose in morphine and heroin?

Mr. Marcus: I object to that as being immaterial.

The Court: The objection is overruled.

Mr. Marcus: There is no showing that there is any lactose in any of those elements here.

The Court: We will have to see what he leads up to. [fol. 100] The objection is overruled.

You may answer.

The Witness: Yes, I have.

Mr. Carr: That is all. I have nothing further.

Mr. Marcus: It leads up to nothing. I move it be stricken, your Honor.

The Court: No. I will deny the motion.

Cross-examination.

By Mr. Marcus:

Q. Where is the test that you performed on this eye dropper?

A. It has been disposed of.

Q. How?

A. The liquids and reagents involved were either poured down the sink or washed off the vessels in question.

Q. In other words, the evidence upon which you predicate your testimony is not in court today, is it?

A. It is not.

Q. Neither is the evidence concerning these empty capsules in court here today, is it?

A. Not the tests or examinations that I performed, no, sir.

Q. And neither is the residue that you claim was on the spoon, that you used and found to be morphine?

A. Not all of the residue, no, sir.

Q. Is there any—

[fol. 101] The Court: You must have misunderstood, a bit, the last question. I thought he meant to say—you better read it to him, Mr. Goebel.

(The question was read by the reporter.)

By Mr. Marcus:

Q. Well, the portion that you performed the test on is not here?

A. Is not here.

Q. In none of these items, of the capsules, the eye dropper, or the spoon; is that correct?

A. That is correct.

Mr. Marcus: Now, I move, your Honor, that all the evidence respecting the tests be stricken from the record on the grounds that the evidence has not been produced and the best evidence is not here.

The Court: Well, now, Mr. Marcus, if he had saved the solutions and brought them here, how much would you and I have known about them? In other words, is it not a matter that is for those experienced and skilled in the scientific world to make their deductions from, depending upon the reactions that they get from the application of the acids and chemical substances that they use?

Mr. Marcus: Your Honor, I believe that so far as the defendant is concerned, we have a right to examine the same substance that he examined and we have a right to perform the same test that he performed upon the same object, and to have an expert express his opinion on it. If he has destroyed the evidence upon which he predicates [fol. 102] his testimony—and I believe your Honor will take judicial cognizance that he cannot express an opinion as to what is in this spoon now and in these capsules now or in the eye dropper now—that his entire testimony is predicated, as he has testified, upon the test that he made, and if he destroyed the test, he destroyed the evidence. I

submit, your Honor, that all the evidence should be stricken on the ground that the best evidence has not been produced.

Mr. Carr: The capsules, Exhibit No. 1, are here. If you want to make a test on them, they are there, all except the portion which was tested, which chemical properties have been changed; and nobody can make a test on them.

Likewise, whatever is in the capsule, you can test that. But the test has been changed, and therefore no test can be made on that, and it goes right along.

Mr. Marcus: Just a minute. Let me ask this witness a question.

By Mr. Marcus:

Q. Now, had you brought the test that you made here to court instead of pouring it down the sink, we would have been able to perform the same test, wouldn't we?

A. No, sir.

Q. Why not?

A. Because the original substance had been altered by the reagents.

[fol. 103] Q. That is the way you discover there is any morphine present, by the chemical reaction?

A. That is correct.

Q. If we had the substance here we could tell if there has been a chemical reaction, couldn't we? "Yes" or "No."

The Witness: Would you read the question?

The Court: Will you read it, please?

(The question was read by the reporter.)

The Witness: I am a little confused as to what you mean by "the substance."

By Mr. Marcus:

Q. The substance that you tested with the reagents, the sulphuric acid. If you had the substance here before the court, we would be able to tell what the contents of that reagent contained, would we not?

The Court: You mean, I take it, Mr. Marcus, after he put whatever substance he got out of these capsules and off of the spoon and out of the eye dropper, after he ap-

plied his drop of water and whatever chemicals he used; that result, if we had that here in the form of the liquid that was produced, would we be able to determine, or would someone skilled in that scientific field——

Mr. Marcus: Chemistry.

The Court: —be able to determine that morphine was one of the substances in that liquid compound?

Mr. Marcus: Right.

[fol. 104] The Court: Now, what is the answer to that, if you followed me?

The Witness: I followed you, and the answer is "No," because the——

By Mr. Marcus:

Q. How did you determine that it was in there, then?

A. The initial reactions which take place when the suspected substance is placed in the reagent indicate conclusively that the substance is morphine or it is not morphine.

Q. Well, that indicates it because of the reaction that takes place in the chemicals, does it not?

A. That is correct.

Q. Then if you brought the chemicals to court here we would be able to tell what is in there, wouldn't we?

A. The——

Q. Wouldn't we?

A. No, sir, you would not be able to tell.

Q. How do you tell it, then?

A. The substance is so altered chemically that it would be impossible to say from an after examination that the substance originally in those reagents was morphine, because——

Q. Well, if it is altered to such an extent that you can't tell whether or not it has morphine in it, how are you able to tell that it did have morphine?

[fol. 105] A. The reactions produced by placing the substance in the reagent.

Q. Well, now, it is a fact, isn't it, that the chemicals do not completely destroy the property tested?

A. They do. They change it to such an extent that it would be impossible to identify the substance morphine in the reagent after you had applied the test.

Q. Now, there was such a small amount that you couldn't

save it, could you, and it was destroyed in the test, wasn't it; and that is the reason you dumped it down the sink?

A. That is the reason I dumped it down the sink.

Q. Or poured it down the sink, pardon me.

A. No. The results of the test after the tests have been performed are of no value.

Q. Did you prepare any written statement of the test of what you used?

A. The chemicals that I used, and so forth?

Q. Yes, sir, and the reactions that took place and what you did in connection with the test.

A. I did not.

Q. You say you prepared four hundred tests—hundreds of tests?

A. Hundreds of tests.

Q. And you remember what you did in this particular instance?

[fol. 106] A. I do.

Q. And the reactions in this particular instance?

A. Yes, sir.

Q. Without any written record of it?

A. Yes, sir, I do.

Q. How many tests did you perform last Friday?

A. Last Friday?

Q. Yes.

A. I performed none last Friday. It was a holiday.

Q. How many did you perform two weeks ago Friday?

A. None. I was on vacation at that time.

Q. Hany many tests did you perform a month ago Friday?

A. I don't remember.

Q. On the Thursday before that?

A. I don't remember that.

Q. And the Wednesday before that?

A. I don't remember.

Q. How many tests did you perform two months ago?

A. I don't remember. I can't recall.

Q. And you mean to testify now that you remember making this test in July?

A. I do, yes.

Q. How long ago is July from this date?

A. It is a little over two months.

Q. And you can't remember how many tests you made a month ago, can you?

[fol. 107] A. No, sir, I cannot.

Q. But you can still remember what tests you made two months ago, is that right?

A. I can remember the tests I made—

Q. Just answer my question, please.

A. No, sir, I can't.

Q. You can't?

A. I beg your pardon. Would you read that question again?

The Court: Mr. Goebel, your professional services are requested.

(The record was read by the reporter.)

The Witness: No, I can't remember all of the tests I made two months ago.

By Mr. Marcus:

Q. You can't remember any tests you made two months ago, can you?

A. I can.

Q. For instance, one that you made two months ago today?

A. The tests regarding this amount of evidence here.

Q. Two months ago today?

A. It wasn't two months ago today.

Q. I am asking you that question.

A. I beg your pardon?

Q. What tests did you perform two months ago today?

A. I don't know.

[fol. 108] Q. As a matter of fact, you refreshed your memory, didn't you, before coming to court today, about the tests in this case?

A. Not about the tests, no, sir; but the results of the tests only.

Q. About the results of the tests that you performed?

A. I did.

Q. And before walking into court today you didn't remember what tests you performed, did you?

A. I did.

Q. You refreshed your memory, though, didn't you?

A. Yes, previously to coming here.

Q. Is that right, Mr. Cromp?

A. I beg your pardon?

Q. Is that right?

A. I refreshed my memory previous to coming here, yes, sir.

Q. From what?

A. From written reports that I had made.

Q. Where are the written reports? I thought you said a moment ago you made no written reports with regard to the chemical tests.

A. I made no written reports as to the chemical tests that I made. I made a written report regarding the results of the tests, indicating that there were in this evidence two capsules containing the narcotic drug morphine, five ap-[fol. 109] parently empty capsules containing a residue of morphine or morphine derivatives, a teaspoon which contained a residue of morphine, an eye dropper which contained morphine or morphine derivatives, and a small paper bag containing a white powder.

Q. That is all your opinion based on tests which you have no knowledge of performing at this time?

A. I know what tests I performed.

Q. What tests did you perform on the 31st of June, 1949?

A. I don't remember what tests.

The Court: On what day of June?

Mr. Marcus: The 31st day of June.

By Mr. Marcus:

Q. What tests did you perform on the 31st of June?

A. I performed none.

The Court: There would be none because you have got a day that does not exist.

Mr. Marcus: Your Honor, I am testing this witness' credibility, and that is the very purpose of that.

By Mr. Marcus:

Q. What tests did you perform on the 2nd of July?

The Court: Then I wanted you to know that I was following you, sir.

Mr. Marcus: Thank you, your Honor.

The Witness: I don't remember exactly what tests.

[fol. 110] By Mr. Marcus:

Q. What tests did you make on the 1st of July?

A. I remember that I made these tests.

Q. That is because you refreshed your memory before coming to court today?

A. It is.

Q. And with respect to the actual tests that you made, you have no record?

A. Yes, I remember what tests I made on the substance.

Q. Do you have a record, is the question.

A. Do I have a record of the exact tests?

Q. Of the exact tests that you performed.

A. No written record.

Q. That is what I am asking you. So you couldn't have refreshed your memory as to the actual tests that you made because you have no written record?

A. No, but I know what tests I performed.

Q. Did you perform a microscopic test of this substance?

A. Yes, I looked at—

Q. Do you know what a microscopic test is?

A. I do.

Q. It is different than the chemical test, is it not?

A. Yes.

Q. Did you perform a microscopic test?

A. I did.

[fol. 111] Q. Did your records show that you performed it?

A. Yes, sir.

Q. Why didn't you testify on direct examination that you performed a microscopic test?

Mr. Carr: I am going to object to that. There was no question asked of him. It would be a voluntary statement.

Mr. Marcus: He was asked what tests he made.

Mr. Carr: I asked him if he tested it.

Mr. Marcus: All right, he asked him if he tested it.

The Court: Oh, I will sustain the objection to that. You

can still pursue that. That question is somewhat argumentative, too.

By Mr. Marcus:

Q. Did you actually perform a microscopic test?

A. I made a microscopic examination of the five apparently empty capsules to determine if there was anything that I could see in them,——

Q. Did you——

A. —besides what I could see with the naked eye.

Q. Did you do that?

A. I did.

Q. Do you have a written record of that?

A. I have not.

Q. Did you perform any other microscopic tests on the 30th of June, 1949?

A. I don't recall whether I did or not.

[fol. 112] Q. The day before that?

A. I don't know.

Q. The day after the 1st of July?

A. I don't know.

Q. And you have no written record of any kind concerning a microscopic test in this case, have you?

A. No, sir, I have not.

Q. Then how do you remember making a microscopic test on this, if you have no written record of it and you do not remember any other tests that you made immediately prior thereto on the 1st of July or immediately thereafter on the 1st of July? You are guessing, Mr. Crompton, aren't you?

A. I am not guessing.

Mr. Carr: Just a minute. Wait a minute. Give him a chance to answer one question at a time.

The Court: Do you want the other answered?

Mr. Carr: How do you remember? Go ahead.

By Mr. Marcus:

Q. How do you remember, Mr. Crompton?

A. I remember from the character of the evidence and the evidence itself.

Q. But you cannot remember any other test that you

made of any other object the day before or the day after, can you?

A. I don't recall what I did those two days, no, right now.

Mr. Marcus: That is all.

[fol. 113] Mr. Carr: That is all.

The Court: Let me inquire, Mr. Crompt, are these tests such that the results are to be determined immediately following the application of your chemicals and then the effect lost, or is the result to be determined over a period of time by reason of the saturation of the substance, or what is it? I have a cumbersome way of trying to get over to you the idea I am searching for, and if it is not clear, I won't be embarrassed if you say so.

The Witness: It is perfectly clear. The results of the test must be determined immediately after the test is performed. The substance remaining any appreciable length of time after the test is of no value.

Mr. Marcus: May I ask him a question following your interrogation, your Honor?

The Court: Yes. I will ask perhaps another one, it may not further clarify it; but what happens immediately upon the application of the chemicals is the basis upon which you arrive at your conclusion as to what the test substance is? Is that the idea?

The Witness: Yes; immediately or within a few minutes thereafter. Beyond that time there is no value to the products remaining from the test.

The Court: All right, Mr. Marcus.

By Mr. Marcus:

Q. You say there is a powdery substance left in there?
[fol. 114] A. In what?

Q. In the capsules.

A. Which capsules?

Q. In the capsules that you have just talked about, those five there.

A. These five (indicating)?

Mr. Carr: Exhibit No. 2.

By Mr. Marcus:

Q. Exhibit No. 2. C

A. I do.

Q. Was there about that same amount that you tested?

A. No, there was a little more that I tested.

Q. Well, would you say the remaining amount here is equal to the amount that you tested? Is that clear? Do I make my question clear, your Honor?

The Court: Yes.

The Witness: The amount remaining is less than the amount that was there.

By Mr. Marcus:

Q. Approximately how much less?

A. I couldn't say exactly.

Q. But there is enough to test there, isn't there?

A. There is enough now to test, yes, sir.

Q. All right. Can you make a test of that?

A. I can.

Q. How do you determine whether or not it has got morphine after you make the test?

The Court: What are we supposed to look for, in other [fol. 115] words?

Mr. Marcus: That is right.

The Witness: Well, from the observations of the reactions.

The Court: The observations of the various reactions.

By Mr. Marcus:

Q. What reactions were there in the tests that you made of Exhibit No. 2?

A. In the case of the capsules, the reaction with Froehde's reagent, a violent, brilliant purple color, indicating morphine or morphine derivatives.

Q. What color is the Froehde solution?

A. I beg your pardon?

Q. What color was the Froehde solution?

A. The Froehde's reagent is colorless.

Q. It produces a violent purple?

A. Yes, sir.

Q. All right. What else?

A. The general reaction for the alkaloid group.

Q. What did you find from the result of the examination of these?

A. With Froehde's reagent?

Q. What else?

A. I used the Meyers' reagent to test for the general group of alkaloids.

Q. What did you find?

A. I found that there were alkaloids present.

[fol. 116] Q. How? How did you determine the presence of alkaloids?

A. By dissolving a small amount of substance in a drop of water, applying a drop of the Meyers' reagent, whereupon a precipitate, a yellowish-white precipitate was formed. This is formed only with the alkaloid group.

Q. Did you test the yellowish-white precipitate?

A. No, sir, I did not.

Q. Well, does any other chemical make a violent or brilliant purple besides morphine?

A. None to my knowledge.

Q. So, to your knowledge, it would have to be morphine, being a violent purple?

A. Either morphine or one of its close derivatives.

Q. What does the Meyers' solution contain?

A. It contains a solution of potassium mercuric iodide.

The Court: Will you read that, please?

(The answer was read by the reporter.)

By Mr. Marcus:

Q. That is what you use to test?

A. Yes, sir.

Q. You have still got enough there to test, haven't you?

A. Yes, in some of the capsules; yes.

Q. All right. And you still have got enough on the spoon and the eye dropper to test?

[fol. 117] A. I don't know about the eye dropper.

Q. How about the spoon?

A. There may be enough left to test on the spoon. I wouldn't be sure.

Q. You said that there was a residue left there.

A. Yes, sir.

Q. So if there is a residue, you can determine whether or not there is morphine?

A. Yes.

Q. Then there is enough left to determine, is there?

A. Probably is, yes.

Q. You say that after the use of the Froehde's test, that is, the sulphuric test?

A. Yes, sir.

Q. Does it change back to white or does it remain purple?

A. It does not remain purple. It turns to a blue, and eventually to a muddy brown color.

Q. And it remains a muddy brown color?

A. That is correct.

Q. And it will remain after that a muddy brown color?

A. That is correct.

Q. That is from the morphine?

A. Not necessarily, no, sir.

Q. What is it from? It comes from the purple to the—what?

[fol. 118] A. To the blue.

Q. To the blue, to the muddy—what?

A. Muddy brown.

Q. Muddy brown. That comes from the morphine, does it not?

A. If a series—

Q. That comes from the morphine?

A. The muddy-brown color can be produced by many other substances.

Q. But this muddy brown would come from the morphine if you used morphine to start with?

A. If you used morphine to start with, the end product would be a muddy brown.

The Court: But if you start with something that you don't know, and you get a muddy brown result, does that tell you it must be just morphine or one or two or half a dozen things?

The Witness: It may be almost anything else, a large number of other substances.

By Mr. Marcus:

Q. Does morphine always produce a purple?

A. It does.

The Court: What other things produce a purple when treated with that reagent, if anything?

The Witness: Nothing that I know of.

The Court: All right.

[fol. 119] The Witness: Nothing to my knowledge.

By Mr. Marcus:

Q. Nothing to your knowledge?

A. That is correct.

Q. What produces a brown, the muddy brown?

A. Almost anything of organic nature. It results in the charring of the organic compound.

Q. Give me one or two substances.

A. One or two substances?

Q. Yes; that produces a muddy brown.

A. Gums or resins from trees, saps.

Q. Do you have any in your laboratory?

A. Several of the organic compounds, like phenols, fats.

Q. If you saved these tests, you could point out, could you not, the muddy substance resulting from the tests that you made?

A. It would be a muddy substance, but it would have no value.

Q. But you could point them out?

A. But it would have no value as far as indicating what the original substance placed in the reagent was.

Q. Have you ever tested the muddy substance?

A. I beg your pardon?

Q. Have you ever tested the brown muddy substance?

A. The brown muddy substance?

Q. Yes.

[fol. 120] A. Yes, I have.

Q. What does it contain?

A. It might contain almost anything. I have tested substances which turned out to be earth mixed with water.

Q. No. No. When you first start with morphine and it becomes a brown muddy substance, what does it contain? Have you ever tested it?

A. No, sir, I have not.

Q. Then how do you know that it doesn't contain morphine if you haven't ever tested it?

A. I know that it doesn't contain morphine, because the organic compound morphine cannot stand the heat or continued application of a strong solution of sulphuric acid.

Q. Have you ever tested it to ascertain that?

A. No, sir, I have not.

Q. Have you ever used any other chemical reagent on the brown substance where the beginning substance was morphine?

A. No, sir, I have not.

Q. Then you are not able to tell us now, are you, whether or not the substance still contains some property of morphine that could be tested or determined?

A. Yes, I am.

Q. Well, you have never tested it, have you?

A. From my knowledge of chemistry.

[fol. 121] Q. You have never tested it yourself, have you?

A. No, I have not.

Q. You have never performed any test upon the brown substance?

A. Upon the brown substance resulting—

Q. Resulting from the use of morphine.

A. Resulting from the use of morphine with Froehde's reagent?

Q. Right.

A. No, sir, I have not.

Q. And you destroyed all that evidence by throwing it out?

A. Yes.

Mr. Marcus: That is all.

Mr. Carr: That is all.

The Court: I take it the witness may be excused?

Mr. Carr: Yes.

The Court: You may be excused.

(Witness excused.)

Mr. Carr: At this time, if the Court please, we offer the exhibits heretofore introduced for identification, in evidence.

Mr. Marcus: Well, now, your Honor, could you give us—

The Court: Yes, we are going to have to continue this case to the morning, I am afraid. We have got a jury that is ready to report.

[fol. 122] Mr. Marcus: Counsel, have you concluded your case?

Mr. Carr: As soon as I get a ruling on my offer.

Mr. Marcus: Your Honor, that is going to take some time and I want to prepare the argument.

The Court: All right. Do you want that question to go over to the morning?

Mr. Marcus: Well, I have got some other matters. Could the court set it over to some later date, because the whole case depends upon the objection?

The Court: Sometime tomorrow I will be glad to hear you, any time.

Mr. Carr: Do you contemplate putting on a defense, Mr. Marcus?

Mr. Marcus: Oh, yes.

The Court: Well, you are actually in trial here. You ought to finish up this case before you get started in another one. It just adds complexity to complication.

Mr. Marcus: What I want to do is to brief this case, your Honor. I want to be of some assistance to the court. This is an important legal proposition. This may have some bearing on the future of a lot of cases before this court and other courts. Your Honor probably recollects reading a matter of similar import in one of the daily papers concerning a like transaction that occurred in the city and was sought to be used in evidence in the federal courts, and it was held to be in violation of the defendant's constitutional [fol. 123] rights.

The Court: Well, I am not planning to be here after this week for a little while, and I hesitate to see it go on over such an extended period. Could you be ready by Friday morning? That gives you two days in there, plus three evenings.

Mr. Marcus: Would it inconvenience the court too much if it was heard Thursday afternoon, the argument?

The Court: No. That is all right. I will set it at 2:00 o'clock for your argument.

Mr. Marcus: 2:00 o'clock.

The Court: All right. The matter is continued to 2:00 o'clock on Thursday of this week, that is the 15th, at 2:00 o'clock.

Mr. Marcus: Would your Honor, in view of the importance of this matter, would your Honor care to order a transcript on this case?

The Court: No, I don't think it is necessary. I am pretty much up even with you on what the evidence is here so far, and it will serve to refresh my recollection and to review a bit my somewhat out-of-date chemistry, but not entirely.

(Whereupon, at 5:07 p. m., Tuesday, September 13, 1949, an adjournment was taken until Thursday, September 15, 1949, at 4:10 p. m.)

[fol. 124]

Los Angeles, California,

Thursday, September 15, 1949, 4:10 P. M.

The Court: We will take a few minutes recess and then we will hear you gentlemen in People vs. Rochin.

Mr. Marcus: Judge, before you leave the bench, I was going to suggest this: The matter of argument in this case—as I understand, the People have closed their case?

Mr. Carr: That is right.

Mr. Marcus: The matter of argument on the motions is going to take some time. There are amici curiae counsel. As a matter of first impression, it is of considerable importance in this State. There are no adjudicated cases in this State on the point. There is some dictum in one case that was decided, I believe, in 1944. That arose out of the condemnation of an automobile, and that was simply dictum and confined to that case, and the court made the observation in that matter that it was simply stated there and assumed that these facts and the law enunciated in that case would apply if there was a criminal prosecution, but there has been no adjudicated case in this State as yet.

I believe the matter is of sufficient importance to warrant a full and complete argument and brief on the subject. I have during the two days allotted in the interim made considerable research on the law. I have been assisted by other counsel who are likewise interested in mat-

ters of this kind. I have a brief here that is some forty [fol. 125] pages long. It involves a violation of the Fifth and Fourteenth Amendments to the Constitution, although I will concede that the unlawful search and seizure provision is not at the moment applicable to the law in this case.

I would suggest, your Honor, in view of the importance of this matter, that the case be continued so that a full, fair, and complete hearing can be gone into. As the court knows; I have presented no defense as yet. I might suggest, I have four or five witnesses here that will go to the question of the force used, although I think there is enough in the record now to indicate that there was force used in the extraction of this evidence.

The Court: Is associate counsel going to be associated with you in this argument or not?

Mr. Marcus: A Mr. Taintor called, your Honor. Mr. Taintor went to school the same time I did and graduated the same time; and his associate and another counsel here by the name of Mr. William Ring have asked to become associated in the matter. He has been preparing a brief. He desires to be heard in the matter of argument as *amicus curiae*.

I might state to the court, I have been contacted by at least 15 attorneys in the last day or so in this matter, so it is a matter of considerable interest and I believe of considerable importance.

Mr. Carr: Is your client here, Mr. Marcus?
[fol. 126] Mr. Marcus: I beg your pardon?

Mr. Carr: Is your client here?

Mr. Marcus: Oh, yes. Come forward, Mr. Rochin.

The Court: Well, I am not adverse to giving counsel a full opportunity to present this matter, and I had confidently expected that we would be able to get around to it long before 4:15, but I had some complications arise today, and one this afternoon over a water case that I have been struggling with for about three years. I cannot help interruptions like that, that is part of my regular judicial necessities.

I am not going to be here after tomorrow until the 11th of October, and I do not want anything additional set on

that date. I am inclined to give you fellows a chance to argue further.

Mr. Carr, you are probably a little bit tired today, are you not?

Mr. Carr: No, your Honor. My whole day was spent looking forward to just this particular case and the argument.

The Court: You have got a great sense of humor this late in the afternoon, I must say.

Well, do you think you could keep your enthusiasm up over a period of two or three weeks, or would it wane to the point of your not being able to respond, even, to your adversary's legalistic analysis?

[fol. 127] Mr. Carr: No. My argument is based on pure logic, if the Court please, and the law of the land. Other than that I have nothing to say.

Mr. Marcus: You mean the law of this State or the law of the land? Don't go too far.

The Court: Mr. Ring, you are going to be heard, I gather. You spoke to me at the desk, I believe, sometime today, and said you were making some research or had done some and you would like to perhaps be heard. Is that correct?

Mr. Ring: Yes, your Honor. I would rather do it more as a friend to the court than otherwise. Mr. Marcus and I happened to be opposed to each other in another matter this morning, and we were discussing this matter just briefly, and he told me it was coming up, so I said I would be glad to give the court the benefit of whatever I had, if it was agreeable to all concerned.

The Court: Well, I have no objection to getting the light from whatever source it may be available from and giving you an opportunity to be heard either as associated with Mr. Marcus or as one of these friends of the court.

Mr. Ring: Well, your Honor, I have never offered myself from the standpoint of giving any light. I will guarantee to make some noise.

The Court: Well, I don't think you should speak in any disparaging fashion of your legal efforts. I have heard [fol. 128] a good many of them, and I can remember back a period of probably 10 or 11 years when you were in a major piece of litigation and persuaded me that you were right.

Mr. Ring: Well, I know, I was on—more or less on the side of the prosecution. That was that contempt case. But since that time, your Honor, there have been a great many things happening. In the first place, my veins are growing more varicose, and I think, despite my wishes and desires, that possibly I am not quite as enthusiastic as I was then.

I am interested in this question, however, and I am glad that it is possible you are not going to take it up today, because I don't want to present anything that will interfere with what has been presented; but there is a phase of it that I am interested in in another matter, and I have possibly some references that might refresh the court's knowledge on the subject.

The Court: All right. I think I am going to continue this case unless there is some serious objection, Mr. Carr.

What date is it after the week of the 10th that I set Mr. Packard's case? I am not going to let that get interfered with if I can avoid it.

The Clerk: That was the 14th. The 17th is the Jensen case.

The Court: The Jensen case and that case—I don't want anything to happen to them. That is the 14th and 17th. [fol. 129] The 12th is a holiday, and the 11th I am loaded.

Well, that means either the 13th or the 19th, gentlemen. I am not going to bother with the 11th, the 14th, or the 17th of October. Now, I am giving you a choice of the 13th and the 19th. One is a Thursday and the other is a Wednesday.

Mr. Marcus: I will take the 13th, your Honor, if that is agreeable with counsel.

The Court: That is the first available date.

Mr. Marcus: That is right.

The Court: Is that all right, Mr. Carr?

Mr. Carr: Well, frankly, I am going to get a few days off in that week. The 12th is a holiday, Judge.

The Court: Yes.

Mr. Carr: And I don't know whether I will be able to get the 10th or 11th or 13th or 14th. I have to go up to Hamilton Field near Sacramento during that period of time. I wonder if it couldn't be made—would the 19th be all right, Judge?

The Court: Yes.

Mr. Marcus: Yes.

The Court: That is quite all right. I am just trying to give you the available days.

Mr. Marcus: Yes.

Mr. Ring: That is better for me, too. That comes right after my birthday. I will feel better.

Mr. Marcus: I should think, if we took it before his birth-
[fol. 130] day he would feel better.

The Court: All right. At the suggestion of counsel for the defendant and by reason of the suggestion that other counsel may desire to appear as friends of the court to present some argument, the matter of *People vs. Rochin* is continued for further hearing, proceedings and argument to the 19th of October on the 9:00 o'clock calendar.

Mr. Ring: If it will be helpful, your Honor, I will be glad to do this, too: I only intend to present one point, and, since we have a little time now, I will put my citations in the form of a memorandum and give counsel a copy in advance so if they desire to look them over they may.

Mr. Marcus: Your Honor, I was going to suggest that, too.

The Court: Let me say this to you gentlemen. I am perfectly agreeable to the suggestion if you want to, but I am inclined to prefer in this kind of a case that you argue it out to finality here rather than submit briefs or anything on it.

Mr. Ring: I didn't mean a brief, your Honor. I just thought it might be a little fairer to the other side and all concerned if they had a list of the references.

The Court: If you want to, you are, of course, at liberty to do that; but I did not want to give the impression that we were going to start a briefing proposition.

Mr. Rochin, you are on bail?

[fol. 131] The Defendant: Yes, sir.

The Court: You understand that you will be back on the 19th of October?

The Defendant: At 9:00 o'clock.

The Court: At 9:00 o'clock.

Mr. Marcus: Judge, may I interrupt for just a moment? In view of the fact that the matter has been continued for some time to next month and the evidence might slip you

by that time, it only took an hour and a half or two hours, would it be possible for your Honor to order a transcript?

The Court: Yes, I think I probably would like to have that. I will make an order now, Mr. Reporter, that the evidence in this case heretofore given be written up.

Mr. Marcus: And may counsel be furnished with a copy?

The Court: Yes. I will let both the People and the defense attorney have a copy, and give me one also, in view of the length of time that is going to transpire before we are able to have the further proceedings and hearing.

(Whereupon, at 4:30 p. m., an adjournment was taken as above noted.)

[fol. 132]

Los Angeles, California,

Wednesday, October 19, 1949. 9:35 A. M.

The Court: Has Mr. Marcus shown up yet? People vs. Rochin. Are you here, Mr. Rochin?

The Defendant: Yes, sir.

The Court: All right, fine. Your lawyer has not shown up here. The other lawyer——

The Defendant: He hasn't shown up yet.

The Court: You have not seen him yet?

The Defendant: I called him at his office and he told me he would meet me here.

The Court: Yes. He called the Clerk and said he would be a little late.

The Defendant: I can call him up and see if he is at his office.

The Court: I am sure he is on his way or detained somewhere else. You just sit down and be patient, then, until we get around to it. It looks to me like we are going to have to maybe start our other case and interrupt to take care of this, then.

(Recess.)

The Court: I see Mr. Marcus has come in.

Mr. Marcus, is your client here?

Mr. Marcus: Yes.

The Court: Have him come up. You are a little late this morning, Mr. Marcus, which we won't be annoyed

about, so you do not need to apologize. Mr. Ring was [fol. 133] not feeling well at all and was not anxious to argue, and we had a jury here that we did not want to be delayed too much with, but we will have to put this argument over to one day next week.

Have you got any suggestions, gentlemen, as to what day next week? Mr. Ring said any day except Friday of this week, he had to be in Pomona.

You cannot be in but one place, Mr. Carr, so I take it that after you finish the case over there in trial you will be back in this court.

Mr. Carr: I am with you all the time, Judge, I am just like a bad penny.

Mr. Marcus: Your Honor, would it be all right—

The Court: Any day but a Tuesday.

Mr. Marcus: Two weeks from today in the afternoon? It is only a question of argument now.

Mr. Carr: Are there going to be any defense witnesses called?

Mr. Marcus: If we do, it will only be about 10 minutes.

Mr. Carr: This afternoon—

The Court: Can't we do it earlier than two weeks? That is putting it over quite a bit.

Mr. Carr: The only complaint I have is the afternoon. Generally something is going on in the morning and then we just go on into the afternoon.

The Court: Do you have some time within the next week, [fol. 134] do you think?

Mr. Marcus: Your Honor, let me see what I have on my calendar.

The Court: All right. Please do.

Mr. Marcus: I don't have my calendar. Could we set it over to a week from tomorrow?

The Court: Today is the 19th. That would be the 27th, is that right?

Mr. Carr: Yes.

Mr. Marcus: That is right, your Honor.

The Court: Let's make it in the forenoon and then we will be able to take it on and not get too complicated, I believe.

Mr. Marcus: Your Honor, as a matter of information, has

the Court been able as yet to at least glance through that brief that was filed?

The Court: Well, I have not read it all, as I told Mr. Ring, I had not been able to read it all because it is rather copious.

Mr. Marcus: Yes.

The Court: That is one reason why I was not particularly anxious to have the case argued this morning, because I have not had a chance to read it all and digest it, so that I was entirely agreeable to some further date.

Then we will make it the 27th at 9:15.

Mr. Rochin, you understand you are to be back here on [fol. 135] the 27th at 9:15?

The Defendant: Yes, sir.

The Court: Now, that is a week from tomorrow.

The Defendant: Yes.

The Court: All right. The matter may be continued to that date.

Will you call Mr. Ring and tell him the new date, Mr. Marcus?

Mr. Marcus: Yes, your Honor, I will call Mr. Ring.

(Whereupon, at 11:00 a. m., an adjournment was taken until Thursday, October 27, 1949, at 9:15 a. m.)

[fol. 136]

Los Angeles, California,

Thursday, October 27, 1949. 9:25 A. M.

The Court: People vs. Rochin.

Mr. Marcus: I have that Rochin case, too, and I am going to ask your Honor to excuse me to approximately 11:00 o'clock. We started a preliminary hearing yesterday, a murder matter, across the street. It should be through within an hour.

The Court: Well, in other words, you are not ready to argue the other case this morning?

Mr. Marcus: I am ready to argue it.

The Court: I mean, your time is not—

Mr. Marcus: The time isn't opportune at the moment.

The Court: Well, how about the gentleman who filed the amicus curiae brief? Is he here or going to be here?

Mr. Marcus: I haven't seen him.

The Court: Well, in other words, you are in the midst of your—

Mr. Marcus: In the midst of the preliminary.

The Court: —the preliminary hearing?

Mr. Marcus: That is right, your Honor.

The Court: And you are not likely to get through with that until when?

Mr. Marcus: I anticipate it will take about an hour longer.

The Court: I have got to get around to a jury case here [fol. 137] in a little while, as soon as I can get some other things worked out.

Is your client here this morning?

Mr. Marcus: Yes, your Honor.

Mr. Rochin, come forward, please.

The Court: Mr. Rochin, will you come forward, please.

Well, I suppose we better just hold it, then, until we see how things work out, until you get through over there, and I will tell Mr. Ring that you expect to be back around 11:00 o'clock, and we will see what kind of arrangements can be made then.

Mr. Marcus: Yes, your Honor. I am in Division 2, Judge Ben Rosenthal.

The Court: In other words, we will have to see where we are. I do not want to be unfair to Mr. Ring, who has done a tremendous amount of work in this case. He wants to be heard and I want to hear him.

Mr. Marcus: I assisted him in that brief, your Honor.

The Court: I noticed your name at the end of it.

All right, then, come back as soon as you are finished.

(Recess.)

The Court: In the Rochin case, I take it, Mr. Clerk, you have not heard anything from Mr. Marcus yet, have you?

The Clerk: No, your Honor. Only about a little more than half an hour ago the clerk of that department said Mr. Marcus was still engaged over there.

[fol. 138] The Court: Well, we will put that over to 2:00 o'clock, then.

(Whereupon at 12:00 o'clock noon, a recess was taken to 4:05 p. m. of the same day.)

[fol. 139]

Los Angeles, California,

Thursday, October 27, 1949. 4:05 P. M.

The Court: People vs. Rochin.

The record may show the defendant—that is your client there with you, is it not, Mr. Marcus?

Mr. Marcus: Yes, your Honor.

The Court: —present with his counsel, also the District Attorney here, and Mr. Ring, who has filed a brief in this matter as amicus curiae.

May I say that it is one of the most comprehensive and thorough jobs I have ever seen presented to a trial court.

I believe we left this in the fashion of whether or not the motion to strike the evidence—particularly the evidence with relation to what the Police Department got when they pumped the defendant's stomach, and their offer to introduce that in evidence, and the objection. Is that not the status of it?

Mr. Carr: Well, in addition to that there were some motions made, as I recall, your Honor, during the introduction of this evidence, and the rulings were reserved, were they not, so I think at this time your Honor should take under consideration the motions as to striking the evidence because of the alleged manner in which the matters were secured as well as the admissibility of the particular exhibits.

The Court: That is right.

[fol. 140] Mr. Marcus: Your Honor, as I understand, the present status of the case may be determined from pages 104 and 105 of the transcript. As I understand the present status of the record, the District Attorney had completed his case so far as the presentation of oral testimony was concerned, and certain exhibits had been marked for identification. There had been no offer with respect to the introduction of those exhibits marked for identification in evidence as yet, except on page 104 they had been offered in evidence.

Mr. Carr: But they hadn't been received.

Mr. Marcus: And then the matter was continued.

Mr. Carr: They had not been received.

Mr. Marcus: They had not been received as yet.

Mr. Carr: That is right.

The Court: All right. So it is the admissibility of that evidence and the relevancy of the evidence with respect to the manner in which the evidence was obtained that are before the court, is that right?

Mr. Marcus: Your Honor, I have not as yet made the formal motion to exclude the testimony as yet for the purpose of the record, and I can state that and do it briefly.

The Court: All right.

Mr. Marcus: We object to the introduction of the evidence into evidence at this time upon the following grounds: upon the grounds under Points I, II, III, and IV of Mr. Ring's brief, and upon those grounds and each of them we [fol. 141] object to the introduction into evidence of the exhibits now marked for identification.

Now I will ask Mr. Ring to take over there and argue the case. I want to compliment Mr. Ring, too, for the excellent manner in which this brief was prepared and presented to this court. In my experience in the past 25 years as an attorney of this bar, I have not seen a brief so well prepared and handled and researched and presented to a trial court as this matter has been done, and I want to express to Mr. Ring my deep appreciation for his interest in this case and the work and time and effort that he has taken, without compensation, your Honor, to present to this court a matter which I believe is of prime importance in the annals of jurisprudence in this State; and I know that your Honor, without even mentioning the fact, will give it the attention and the thought that the effort of Mr. Ring has elicited in this case.

The Court: Well, I might say I have already read it. That would be intimated or inferred, I think, from what I had previously stated; but I have read it, some portions more than once, and have examined a good many of the authorities cited, the most recent one of which was *Wolf v. Colorado*, I guess that is it, which was decided, I believe, last year. I looked through that last evening.

All right, Mr. Ring.

Mr. Ring: Well, your Honor, I didn't know upon coming [fol. 142] here that I would be expected to take over the entire burden of the defendant's argument in the matter. I am wondering this: It is 4:10 now, and I assume that the court adjourns at 4:30—

The Court: No. That assumption is wrong.

Mr. Ring: Sir?

The Court: That assumption is in error.

Mr. Ring: Is that so?

The Court: We are liable to be around here until 5:00 o'clock.

Mr. Ring: I see. Well, the only thing is, if I am expected to carry the whole thing through, why, it might take a little bit longer than I had anticipated.

The Court: You go ahead and argue as long as you want to this afternoon, within reason. If you do not get through we will let you finish tomorrow.

Mr. Ring: Very well.

The Court: In other words, I do not want this case hanging indefinitely too long. We ought to get a decision in this case for everybody concerned, and this is one of the days it has been continued to, so you take over and I will be glad to give you whatever time you feel you reasonably need.

Mr. Ring: All right, your Honor.

There are a number of matters that have been discussed in the brief that I see no particular need in reiterating [fol. 143] at this time. A great many things in there are academic, and the Court is better aware of them than I am; but in building up the argument, why, they were presented more or less with the idea of making as complete a statement as possible.

The first thing that seems to me to be important about this whole situation is this: It has been frequently said that in all probability the Constitution would never have been adopted had the American people of the 13 Colonies not have been assured that it would be followed by a Bill of Rights. Now, of course I know that that is speculation; but, on the other hand, we do know that the matters that are contained in the Bill of Rights are not otherwise contained in the main body of the Constitution, and we also know that at that particular time in the history of this country and of this people it was the things that were later set up in the Bill of Rights that were the most important in the public mind rather than the more mechanical, technical features that went into the main body of the Constitution to lay out a system of government for the United States

and one which would also co-ordinate with the governments of the several States.

Now, if that was important, and that important, for about three million people on the Atlantic seaboard 175 years ago, it certainly is infinitely more important that we have at all times due perspective and due regard for [fol. 144] all of the implications of the Bill of Rights in this day and age, when we are dealing with one hundred forty million people and when on account of the form in which the government of both the Nation and the States has taken in recent years, that, so to speak, every man in his private affairs and every woman, and every child in some respect is required to make reports to the government and more or less disclose matters that were formerly considered those of privacy.

In the old days when the going got a little bit too tough along the Atlantic seaboard, there was always plenty of land on the other side of the mountains; and when the Ohio Valley filled up, why, then they went across the Mississippi and finally got to California; but all of that now is past, the country has been settled up, it is becoming more thickly populated both as to people and as to bureaus and agencies, and bureaucracy, and all of these bureaus and commissions have some authority by which they can reach into a person's private affairs and extract information or reports which he is obliged to give that disclose matters which other departments of the government, while matters are supposed to be privileged, regard as confidential; still, if they came into hostile hands or in the possession of people who were unfriendly and unmindful of their oaths, could be used to the serious disadvantage of the individual. So it is very, very important, in my mind, that we realize [fol. 145] and understand always the importance particularly of the Fourth Amendment and also its relationship to the Fifth Amendment.

In that same connection there is also another general statement of contravention which I think should be made at this time that answers a good deal that has been said by some of the courts that take a different view of this matter. I know that when the *Mayen* case was first decided the Supreme Court of this State took the position, and it was supported by what was said in the *Weeks* case, that

the Fourth Amendment didn't apply to the State, it wasn't binding upon the States, and the States were at liberty as they saw fit to adopt a rule of evidence which would permit the receipt of evidence obtained in violation of the Fourth Amendment.

Now, even down as far as the last case decided by the Supreme Court during the last term, of *Wolf v. Colorado*, a decision wherein by Mr. Justice Frankfurter there is a sort of a tendency to pass over this matter as though we were simply dealing with a technical rule of evidence, in that case a majority of the Supreme Court again held that the Fourth Amendment did not preclude the States from adopting a rule of evidence which would permit the receipt of evidence obtained in violation of the Fourth Amendment, notwithstanding the fact that they held definitely and explicitly in that case for the first time that the Fourth [fol. 146] Amendment is binding upon the States.

Now, when the *Mayen* case was decided it had been held in the *Weeks* case that the Fourth Amendment was not binding upon the States. Now they have gotten over that far our way that the Fourth Amendment is binding upon the States. Judge Frankfurter in his decision, which is warmly and vigorously dissented to by several other judges, said that notwithstanding, they could still—the States could still adopt a rule of evidence that would receive that evidence but with this proviso: they were still bound by the due process provision which guaranteed every litigant a fair trial; so the way is left open now for the courts in this State to revise their opinion in the *Mayen* case, and that is the bell-cow of the whole business. If they find that the receipt of evidence obtained in violation of the Fourth Amendment does result or would result in an unfair trial, then it is incumbent upon the courts to exclude that evidence.

Now, I don't think that Judge Frankfurter's view of the importance of the evidence in that matter, the evidentiary question, is correct at all, with due respect, of course, to the authority which laid down that decision; and I will tell you why. In the first place, when this Bill of Rights was adopted, including the Fourth Amendment, the people of the Colonies as well as the mother country had been going through a period in history where homes were be-

[fol. 147] ing ransacked, private papers were being taken without any process, the person of individuals was being violated, and many, many of the old star chamber rules and procedures were being carried out. The thing that we all know about that brought rise particularly to this question in the American jurisprudence was when Otis made his argument against the writs in Boston there where they were going and making searches and seizures on John Doe warrants and so on—was one of the things that helped to bring this to the public attention.

Now, what is it that happens when the government does a thing like that? It isn't just a matter of a rule of evidence. In the first place, the government punishes the individual by violating some of his fundamental rights before he ever has any kind of a trial at all or any kind of a hearing, because he has the right of personal security, both as to his body and as to his effects, his papers; so that when they go and take something from a man without complying with the Fourth Amendment they are inflicting a punishment on him right there without any kind of a trial whatever. That is the first wrong they do.

Now, of course, they are not doing that just out of pure cussedness or maliciousness, they are doing it for the purpose of obtaining evidence illegally that they hope to be able to use against him in a subsequent trial where they hope to inflict a further punishment upon him; but it is [fol. 148] all one chain and one transaction all the way through. There is one trial without any process whatever, there is a second trial where, if this evidence is used, as I maintain, it is without due process.

Now that was the thing that the Boyd case emphasized. Your Honor will recall that what was involved there was a revenue statute which permitted the Federal Government to take as confessed the amount which they claimed in revenue from the citizen unless he produced his books for their inspection and disproved their claim. The Court in that case held, of course, that it was a violation of the Fourth Amendment and the use of such evidence would be a violation of the Fifth Amendment, and the two amendments co-ordinated and one fed the other and each supported the other. So when Judge Frankfurter or any other court treats evidence that is obtained in violation of the

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Fourth Amendment as involving no more than simply a technical rule, they are losing sight of the fact that the rule under the Fourth Amendment was adopted in the first place to suppress the kind of conduct that the Fourth Amendment itself describes, because that is the only way you can ever uphold the guaranty in the Fourth Amendment. An action for damages against officers who invade a person's privacy cannot possibly indemnify him for the damage that he suffers in a criminal action for the use of evidence against him which was obtained illegally.

[fol. 149] Judge Murphy and his collaborators pointed out very clearly in the case of *Wolf v. Colorado* where the civil damage remedy is of no benefit whatever and it is no deterrent. Now, right in that connection and to show what happens when they start to terminating the Constitution—and also in the last term of the Supreme Court there was a decision in which the Supreme Court threw out the evidence, and it appeared there that what was becoming the practice was this: Inasmuch as the Supreme Court had held that while evidence obtained illegally by federal officers couldn't be used in a federal court proceeding, but it could be used in a state court proceeding, and evidence obtained by state officers could be used in either court; why, then, of course, in every case that they possibly—where there was a double jurisdiction, where it is a crime under the federal or the state law, why, all the federal officers have to do is make some sort of a bargain with the state officers and tell them what they want and sic them onto it, and in they go and get the evidence. If there is any unlawful search and seizure, it has all been done by the state officers, the federal officers come in touch with it in some very mysterious way, and, of course, at the proper time there is an indictment and the state officers come in and testify, yes, they got the evidence and the federal officers heard about it; they may have been around, but the state officers were the ones that did it.

[fol. 150] Now, evidently, from the Court's remarks in this case which was cited in the brief—I don't recall the name of it right now, but it is pointed out there—that has become quite a practice and there are many, many criminal laws, of course, which are violations of both the federal and the state constitutions. If that thing were

carried on to its logical conclusion, it would be possible to completely evade the Fourth Amendment both in the federal and in the state courts just through that kind of a device.

Now, it is my position, first, your Honor, that the first eight amendments to the federal Constitution, comprising the so-called Bill of Rights, were always just as binding upon the States as they were upon the Union. There is one case which the cases dealing with the Fourth Amendment rely upon to hold to the contrary, and with every respect in the world for the decisions to the contrary I earnestly believe that my reasons for disagreeing with that are better than the authority which they cite, because they don't cite any authority at all.

The Weeks case, in holding that the Fourth Amendment was not binding upon the States, relied upon two cases: Twining and Boyd. Twining relied on one case, that was Boyd; and Boyd relied on one case, and that was *Barron v. Baltimore*, and that is the main one on that point, that was decided by Judge Marshall. At the time he decided that the Bill of Rights did not apply to the States, which, of [fol. 151] course, was before the Fourteenth Amendment, it will be recalled that the Supreme Court naturally was never in a more unsettled state than it was then. In every respect there never was a day went by and the Court never rendered a decision but what one or more States weren't up in arms ready to secede. The doctrine of nullifications wasn't just preached in the South; it was preached in Massachusetts, in New England; in fact, every place, New York, all along the Atlantic seaboard; every place wherever the Supreme Court decided a case against their particular interest; and they were all claiming the right to pull out whenever they didn't like what the Supreme Court did.

Now, that went on and continued to be contended clear through Calhoun's time and down into the Civil War. They all claimed that. The jurisdiction of the Court itself was questioned, whether or not it had authority to declare acts of Congress or the States unconstitutional. But here is a significant point, that while Judge Marshall held generally that the Bill of Rights could not apply to the States, he decided in several cases right during that same period

that guaranties under the Bill of Rights were binding upon the States before there was any Fourteenth Amendment adopted. For instance, one of the big arguments, of course, was the land claims, the Yazoo land claims in Georgia when the State and the Indians were in trouble about certain grants that were made, and so on, and one of the most important cases that was decided at any time during the [fol. 152] whole history of the Court, the Court held explicitly that the States could not pass a law which would nullify one of those grants. That comes squarely, squarely within the Fifth Amendment as a denial of due process of law. Of course, it also came within another provision of the main Constitution, too; that part there which declares that the State can't pass a law invalidating the obligations of the contract; but Judge Marshall put his decision primarily on the basis of what he called natural law and natural right, and that is the very essence of all of this modern doctrine of due process and a fair trial and the fundamental rights of man and so on and so forth.

There were several of such decisions handed down at that time, so I can't feel that insofar as that one decision is concerned, that it is any great authority. As to the reasons for it, there are only two of the first eight amendments that indicate what government they particularly apply to; that is the First, which has to do with freedom of expression and so on, and in later years that has become the one that has been applied more against the States than any other; and the other is the one that has to do with certain jury trials in federal courts. Now, except for those two, every one of the other amendments is just as applicable, insofar as its content is concerned, to the States as it is to the National Government. There isn't anything said about "Congress shall not" or "The [fol. 153] State shall not." It says that "No law shall be passed." Well, all right.

Now, what were those people doing when they got up this Constitution and adopted this Bill of Rights? What is it they were doing? At one time it was argued that it was nothing more than a federation, but that was exploded. They were forming a union—or, rather, they were forming a better union than had already been established under the Articles of Confederation.

Now, what did they have to do to form that Union? In the first place, it was always contemplated that each of the several States would maintain its separate entity it had of a government of some kind. It never was completely sovereign, it was always quasi-sovereign because there were a lot of problems of foreign relations that it never had the authority to occasion, but they were sovereign to an extent, and the purpose was to maintain the integrity and individuality of each of those States. That was one thing.

It was, of course, to involve all the people in the Union and all the territory that was made up of all the States, so it would have been impossible, utterly, to have formed a Constitution which would have governed a nation without making that Constitution applicable to the States as well. Of course, that is very obvious because the Sixth Article [fol. 154] provides explicitly that it shall be the supreme law of the land and superior to any law by any State, and so on, that is within its domain; but further than that; further than just mechanical features of the government itself, the Constitution also has certain objectives that are set forth in the Preamble: to form a more perfect Union, to establish justice, to maintain common defense and promote the general welfare, and so on. That is to be done under a system of individual freedom and personal liberty known at that time as the "Rights of Englishmen" which the colonists very jealously maintained.

Now, what would happen, your Honor, to the Union that they were setting up at that time if every State in the Union—if the argument is correct, we have got to assume this—what would have happened to the Union if New York, Massachusetts, North Carolina, South Carolina, and all the way down the line could have passed laws that would have been absolutely at variance with what is set forth in the Bill of Rights? The First Amendment says that the Congress shall make no law regulating religion, and so forth, or freedom of speech and press. Suppose that New York passed a law to the effect that all newspapers shall be censored and no one shall be allowed to make a public speech without going to the Police Commissioner to get a permit to do so, and there shall only be one church in the State of New York and the preachers and the priests

and so forth should be appointed by the Governor, if he [fol. 155] belongs to the right political party. If he doesn't, why, there won't be any church at all.

Now, if the opposite argument is true this Bill of Rights as a part of the Constitution was not binding on the States before there was ever any Civil War or any Fourteenth Amendment. Then every State in the Union could have done that very thing. They could have also passed laws to the effect that the police and the government can go into a man's home without any search warrant, they can raid his person, violate his person, do any and every thing that is prohibited in the Bill of Rights; but then the States could legalize it. Well, what would have happened to the Union? We couldn't possibly have had a Union with the objectives declared in the Preamble of the Constitution and as understood by the Declaration of Independence, and all of the things that had been built up by the colonists, if the States could have turned around and violated every one of those fundamentals.

So when they say that the Bill of Rights was only passed to govern the Federal Government, your Honor, they just miss out on a whole lot there. It was adopted to bind both governments, and all the people of the United States and everybody in it and every court in it—and another thing that bears that out is that provision in the Sixth Article which declares that the Constitution—and, of [fol. 156] course, the amendments are a part of it—is the supreme law of the land, and all the judges of all the States shall be bound thereby to enforce it, and so on. Well, enforce it against whom? State courts don't even enforce the Constitution, as a rule, against the Federal Government. That is done by the federal courts. The only government that the state courts could enforce the Constitution against would be the government of the several States.

So I don't think that *Barron v. Baltimore* is sound authority at all. Judge Marshall was such a great judge that he can afford to make one mistake. I don't think that is any authority at all for the subsequent holdings in *Boyd* and later on in *Twining v. New Jersey*, and they just accepted it. I mean, there was no discussion or no re-examination of the question; they just accepted it, it won't

apply to the States; but it had to apply to the States or there never could have been any Union in the first place. All right.

Now, there were hardly any cases under the—there were no civil rights cases under the state law before the Fourteenth Amendment was adopted, and very much of the same confusion existed for a great many years and it exists today, for that matter, as to the real intent and meaning of the Fourteenth Amendment as partly applied to the first eight amendments. Your Honor will remember the Slaughter House cases. Now, I think Judge Miller was one of the few that held out to the very end [fol. 157] for a narrow construction to the Fourteenth Amendment, and with the view that it should be restricted pretty much to matters that had to do with the colored people. But in the course of time and as commercial and industrial interests became more important and more to the front, why, this idea of vested rights became important, and John Marshall had laid the foundation for that in some of his great decisions. The question then was as to how to enforce that against the state governments.

Well, it wasn't long until they started using the Fourteenth Amendment as a vehicle for doing that and said that whatever interfered with a person's vested right, just as they have said whatever interfered with other natural rights, was a denial of due process of law.

But for years there was confusion as to what the true import and meaning and application of the Fourteenth Amendment was. Now, you remember it wasn't until the '20's, the case of *Gitlow v. New York*, that the Supreme Court held definitely that the First Amendment was imported against the States by the Fourteenth. Then in the course of time they brought pretty nearly all of the others in against the States through that fiction, a fiction, I say, because I don't think it was ever necessary in the first place. I think they were always binding on the States. Nevertheless, rather than changing some of the things they said, why, they tried to do justice by saying it in another way. It was very, very definitely stated by many [fol. 158] decisions, up until this more recent Court, that these amendments, that these parts of the Bill of Rights

that were held to be binding on the States were binding on the States because they were imported to the States as a part of the demand for the process of law under the Fourteenth Amendment.

Now, Judge Frankfurter doesn't like that. He doesn't think that that is the right way to put it. He would like to have it—and has said so and he so far has been able to get the majority to agree with him—that these first eight amendments are not transferred against the States at all by the Fourteenth Amendment; but, on the other hand, if they represent some fundamental right, and that is violated in a state court, then it is a violation of the Federal Constitution because it is a violation of due process of law.

Well, now, to me, your Honor, that is just contrary to the old mathematical principle that if each of two things equal a third, they equal each other. I don't see where there is any difference in the principle at all between saying that the First Amendment represents certain fundamental rights, it is binding on the States—I don't care whether you say it is binding because the Fourteenth Amendment was adopted or otherwise, but it is binding on the States—and saying the principles of the First Amendment are binding on the States because it is essential that they be vouchsafed to a defendant or to an accused or to a party because it is necessary to give him a fair trial or because it represents a fundamental right. I can't see where there is a great danger, and Judge Black pointed that out in the Adamson case in his dissenting opinion in following Judge Frankfurter's rule. I think that every one of the provisions of the Bill of Rights should be regarded as a minimum of due process and should be guaranteed to every defendant. If a right is of sufficient cognizance to become a guaranty in the Federal Constitution, insofar as we are concerned that is fundamental. It is as fundamental as it can be. Now, it may be that there are also other fundamental rights that are not mentioned in the Constitution. The Ninth Amendment indicates that there are rights which the people and the States reserve which are not mentioned in the Constitution, but, at least, that minimum should be preserved. But when you get over into the Frankfurter deal, why, then

you are opening the thing up and allowing the Court in each individual case not to accept this as a fundamental right which must be enforced, but to decide whether or not, despite that right, it is essential to a fair trial. Well, it is possible, through that kind of process, to reason the fundamental right clear out of the book. If a court wants to come to that conclusion, they can say, "Well, I don't think that is necessary for a fair trial"; but whenever you come to that point then you have also come to this, that [fol. 160] written constitutions don't mean anything. You might just as well throw them away, too, and a written constitution exists because there will be certain fundamentals and certain minimums preserved at all times.

Now, as I tried to point out in the memorandum which I presented, I cited every case that was against my position in the matter and tried to distinguish it, and I feel that two conclusions are pertinent to this question here. In the first place, under the present status of the Supreme Court of the United States decisions, the Court has not said that the state courts may not exclude this evidence, they have said that the Fourth Amendment does not necessarily make the exclusion of it imperative, provided that a fair trial can be granted otherwise. The second thing is that under the rule laid down by Judge Frankfurter, I don't see how a fair trial could be granted in a case like this where there not only is one but two of the fundamental guaranties in the Constitution involved and apparently violated.

In the first place, the Fourth Amendment secures a person, the individual, against the violation of his person. Further, the Fifth Amendment also excludes evidence that is obtained by force or other improper means. This is a peculiar situation where both of those principles seem to relate to it. I know that there are cases which have held that the securing of evidence rule has to do mostly with [fol. 161] what people write or say with their mouth, but the Fourth Amendment also touches the matter of violating the person of the individual. Now, if the government can be permitted to pump a person's stomach in order to dislodge evidence which they feel may be used against him—and I understand from a medical authority that while that sort of an operation is not dangerous if prop-

erly performed, it certainly would be dangerous if it were performed in an improper way or were performed by someone who didn't understand how to do it—but if they can go as far as the stomach, your Honor, there is no reason in the world why they couldn't go down into the intestines, too.

The Court: As a matter of fact, they did in a Texas case, did they not, where a fellow swallowed some rings?

Mr. Ring: I think so.

The Court: They gave him an enema and got the results and got the rings, after having used a fluoroscope to locate the rings in the lower part of his bowels.

Mr. Ring: Well, I remember reading such a case as that. I take it there are certain kinds of chemicals, of course, that once they are taken into the system produce a very definite reaction upon the blood and other parts of the body.

Well, there is just no end to the capers that these scalpel-happy surgeons could do if they started looking for evidence in a person's human body; there is just no end. Of [fol. 162] course, they can bring in a world of experts to show that this thing which had vested itself in the bloodstream was part of the thing that was in the stomach, and so forth.

Well, now, it seems to me that the very statement of that proposition is so manifestly and clearly a violation of the Fourth Amendment that there is just no answer to it. The court, itself, as far as I can find, would have no power to make an order for that sort of an examination even in civil cases where a plaintiff is claiming damages for personal injuries. The court certainly has authority to order that the plaintiff be subjected to an examination to determine the extent of his injuries, but that only means this: that if he doesn't want to be examined, he can't be forced to undergo the examinations, and the court will simply suspend the trial.

The Court: I find the Sheriff reports that the jury has arrived at a verdict upstairs in our other case. Now, since it is about five minutes to 5:00, would this be a convenient place for you to take a recess?

Mr. Ring: Yes, it would, your Honor.

The Court: Well, can you gentlemen be back about 9:30 in the morning and finish this argument?

Mr. Marcus: All right.

The Court: Will that be satisfactory, Mr. Marcus?

Mr. Carr: It better be satisfactory with Mr. Marcus.

The Court: Yes. This case is on trial now, I think, and [fol. 163] I want you here.

Mr. Marcus: I will be here.

The Court: Because any priorities that you have got any place else are overcome by the fact that you are actually engaged in trial.

Mr. Marcus: That is correct.

The Court: I will take this up as soon as we call the calendar, and that is the reason I am saying 9:30.

Mr. Marcus: Your Honor, the Court will give me an opportunity to address the Court on the matters of evidence here?

The Court: Yes, I will give you an opportunity to be heard. Of course.

Thank you very much for coming up. You have had about, oh, 40 minutes now.

Mr. Ring: I didn't realize that.

The Court: That is pretty good. In other words, we are just trying to get along in such fashion as we can.

Thank you very much, Mr. Marcus and Mr. Carr. I hope you have not been overburdened.

(Whereupon, at 4:55 p. m., an adjournment was taken until Friday, October 28, 1949, at 11:20 a. m.)

[fol. 164]

Los Angeles, California,

Friday, October 28, 1949. 11:20 A. M.

The Court: People vs. Rochin.

We resume the argument that we interrupted at five minutes till 5:00 last night, I believe, gentlemen.

Mr. Ring: All right. I will make my remaining remarks brief.

The Court: All right.

Mr. Ring: I didn't realize I took up so much time last night.

The Court: You had about 45 minutes last night, but it was not unprofitable.

Mr. Ring: Well, thank you, your Honor.

There are only one or two other matters that I want to mention and which have been partially covered. I was speaking about the original application of the Bill of Rights to the States in the first place, and there was one fact that I didn't call attention to in the first place, and that was this: It is frequently mentioned that some of the original constitutional fathers saw no need for a Bill of Rights, in the first place, because they felt that the Federal Government was one of limited powers, anyway, and that it couldn't possibly do anything that wasn't expressly granted or which wasn't covered by the necessary proper clause, the people didn't pay much attention to, apparently, at that time, because it had never come into play.

[fol. 165] On the other hand, your Honor, I feel that the way that we have to approach that particular phase of it is this: You can look at the architectural plans for a house and determine from that what the intent of the people may have been at the time for their prospective building when they drew the plans and specifications, but it very frequently happens that before the building is actually completed they decided they wanted an extra room here, they wanted another room there, and probably by the time the thing is all done the actual building will be considerably different from what was put down in the architect's plans; so that to talk of Madison and Hamilton and the rest of them is to—this wouldn't be necessary against a federal government, because it was not one of limited powers, the fact that a Bill of Rights was finally adopted, that therefore it must have been just a limitation against the Federal Government, I don't think holds water. You have to look at the house to see what the house is, what it is supposed to hold, rather than what was in the original drawings.

Now, we have already emphasized this fact, that one of the most urgent and critical matters at that period of time was the matter of taxation and the evils that represented from it. The big evil and the thing that apparently aroused the colonists most was this matter of search and seizure and the use of writs of assistance and so on.

Adams, who is regarded as quite a historian of that [fol. 166] time, said that the position taken by Otis in those Writs of Assistance cases was really the spark that set off the Revolution. Undoubtedly, through all of the taxation and navigation acts that were passed during that period, this matter of search and seizure and violation of the person and the home and the effects of the individual was something that was very, very prominent in the minds of the people.

Now, isn't it strange, your Honor, that if that was true and if a federal Bill of Rights was only supposed to govern the Union and not the States, and bearing in mind the fact that by the time the Revolutionary War was over every one of the States had adopted a constitution, a new constitution, with the exception of Connecticut and Rhode Island, which simply used their old original charters as their constitutions; and despite the fact that this burning question, which the historians say was the spark which set off the Revolution, there wasn't one single word in any one of the bill of rights attached to any one of those state constitutions at that time, nor for years afterward, against unlawful search and seizure. The closest approach to it was in Virginia and Massachusetts, where they had provisions against writs of assistance, but the provision as we have it in the Fourth Amendment was not, at the time of the adoption of the Federal Bill of Rights, in any state constitution at all. I think that the people who adopted this had it in mind that the Bill of Rights would be [fol. 167] applicable to the States as well as it should be to the Federal Government.

Now, I have mentioned briefly the fact that during the early part of the history of the Supreme Court and of the government that there was no settled opinion as to either the exact nature of the Federal Government or the real status and relationship of the States to the Federal Government, as was shown by the fact that all of the States at some time or other took the position that they had a right to nullify acts of Congress, and even to secede from the Union. Virginia and Kentucky were the first States to do that. Later New England did so, and at other times a great many of the colonists were opposed to the Embargo, especially was New England opposed to the Embargo that

was enacted in connection with the events which led up to the War of 1812.

At the time of Jefferson, he maintained that, very, very definitely, that each State had a right to determine the applicability and validity of congressional action as against a State; so he reversed that position after he became President, and up until the time of the Civil War there were many, many more acts of Congress that were invalidated by presidential veto, because the President felt that the act was unconstitutional; not by any act of the Supreme Court or any other court.

When the Missouri Compromise was adopted in 1821—this textbook that I have referred to is Kelly & Harbison—[fol. 168] it states that “The sectional champions in Congress could not agree upon either the nature of the Union or the exact extent of federal authority.” But all during this time in various cases that were coming up, the Supreme Court under Marshall was adopting constructions of the Federal Constitution which had a very, very definite interference with rights which the States had formerly contended that they were supreme in. For instance, in *Sterling v. Constantine* and then, of course, in *McCulloch v. Maryland* and then in *Martin v. Hunter*, where they held that the Supreme Court’s opinion of the constitutionality of laws was superior, it transcended the opinion of the state courts as to the constitutionality of laws.

Finally, in the case of *Cohens v. Virginia*, in 1821, Marshall used this language:

“America has chosen to be in many respects and to many purposes a nation, and for all these purposes her government is complete, to all these objects it is competent. The people have declared that in exercise of all power given for these objects it is supreme. It can then, in effecting these objects, legitimately control all individuals or governments within the American territory.”

That was in 1821. However, 35 years elapsed before the Supreme Court finally determined, in *Gibbons v. Ogden*, anything at all about the control of Congress over [fol. 169] interstate commerce, and, as I said before, over all these years and up until the time of the Civil War, the

States in one form or another were maintaining their right to nullify and finally to secede.

In 1798 Jefferson and Madison both advocated a sort of a theory of co-state control to operate in conjunction with federalism. Now, there was Madison, one of the authors of the Constitution took that position in 1807 to 1815, when the Embargo law was in effect, interfering with New England's commerce but not interfering with southern planters. New England was the big seceder then, they were the ones that wanted to pull out of the Union and nullify the acts of Congress and of the President.

In 1832 South Carolina was up in the air about the tariff which interefered with their economic interests at that time; and South Carolina, of course, got the bit in its mouth and Calhoun became more powerful and prominent, and finally it got to the point where, as your Honor knows, under the manipulation of the United States Bank, when the man in this country who was really the first great Republican that we ever had here, old Andy Jackson, and who was quoted more by Lincoln than any other statesman in American history—I believe Andy Jackson took the position that the federal power over matters that were committed to it was supreme, and sent word to Calhoun that if he didn't behave himself and lay off down there, [fol. 170] he would hang him, hang him as high as Haman.

I just can't honestly, your Honor, believe—and I have gone into this quite in detail and taken up a lot of the Court's time in arguing about it—I just don't think that there is any basis for the old holding in that *Barron v. Baltimore* case that the Federal Bill of Rights never applied to the states. I think it did apply to the states. As I said yesterday, and repeat again in closing, it seems to me that it would be preposterous to assume that a people who were forming a Union, an entire people, but which people at the same time were divided up into various states, and which Union was to operate over the same territory, and which Union had for its objectives all of those things that are set forth in the Preamble of the United States Constitution, the guaranties of liberty and justice, and so on; to say that the Federal Government could not enforce the Bill of Rights against the States would mean that the Federal Government didn't have the power to hold itself

together; because otherwise every one of the States could have, had it seen fit, passed laws which violated the First Amendment concerning speech, press, assembly, religion; and at that time, while we don't think of it so much today, the right to bear arms, and so forth, was an important thing. That was just as applicable to the state governments as it was to the National Government. Every State at that time had a strong militia and the States maintained them more than they do today. In the matter of quarter- [fol. 171] ing troops in the homes of people, it was just as applicable to the States as it was to the Federal Government. There was infinitely more danger after the Revolution of the state governments undertaking to quarter militia in the homes of people than the Federal Government who didn't have any arms at all.

You can go right down the line with all those provisions, with the exception of one isolated paragraph there that has specifically to do with trials in federal courts. Otherwise every one of those amendments, except the first by its own terms, is just as applicable to the States as to the Nation. The First Amendment says Congress shall not, and that First Amendment in the years that have followed has been applied against the States more than any other has. I think that there is no question, as a matter of fundamental law and right, that the provision that is in the Fourth Amendment guaranteeing the security of the person is not only fundamental, but it is a commandment which the States can no more violate than can the Federal Government.

I think the rule which has finally been evolved in the later decisions permits the courts of our States now, beyond any question, even whatever their view might be of the applicability of the Bill of Rights to the States, permits them—in fact, enjoins them—to adopt a rule which will guarantee these fundamental rights to every accused, and enjoins a fair trial, and it certainly can't be a fair trial [fol. 172] if they can use evidence which is directly violative of a fundamental principle of our Constitution.

Now, one other word in regard to the *Mayen* case. I want to point this other distinction out. They have said that States have a right to adopt rules of evidence, and this rule of evidence was based upon the common law. In other

words, it is a common law precept that the court won't inquire into the means by which evidence is obtained for determining whether or not it is admissible. Well, your Honor, this rule originated and it was developed long before there was any Constitution of the United States, long before there was any Bill of Rights; and it was one of the things, if the Boyd case has any significance and advocacy today, that the Fourth Amendment was adopted for; was to stop that kind of thing and to stop the use of it.

I think the Court has been very patient and lenient. I don't want to consume any more of your time. I have brought these two books that I mentioned. If your Honor would like to look at them, I will leave them here with the Court:

The Court: I don't know that I will want to look at them in connection with this decision, but I might be interested in looking at them for my own general education and for the erudition that they no doubt disclose.

Mr. Ring: I want to express my appreciation for your courtesy, your Honor, and to state that I feel that there [fol. 173] could be no better compensation for anyone in a matter of this kind than the opportunity which is afforded us to take part and contribute our little mite on the altar of freedom and justice in a principle that I think is as important as this is. Thank you very much.

The Court: You have been very thorough in your presentation. As I said yesterday, I have never had a more complete presentation of a legal question in the form of a brief in my 17 years on the trial bench.

Mr. Marcus, after all, you do represent the defendant—he is here as a friend of the court and arguing on your side—but before we hear from the People I think we ought to hear from you, whatever you want to say, so that the People may then, perhaps, answer both of you at one time. Is that satisfactory?

Mr. Marcus: I am willing to proceed now if the Court desires.

The Court: Mr. Carr?

Mr. Carr: I could go ahead with mine, and Mr. Marcus or Mr. Ring, either one, may answer, if the Court please.

The Court: Well, I think Mr. Marcus probably has some

additional matters, and perhaps it might be just as well if we hear from him now. Then you can answer both of them at one time.

Mr. Marcus: Your Honor, for the purpose of the record, at this time and in order that the record may be clear and [fol. 174] complete, I am going to renew my motions with respect to the striking of certain evidence that was admitted subject to a motion to strike during the course of the trial of this case.

The Court: All right.

Mr. Marcus: Beginning, I believe it was, around page 15 of the transcript and continuing through—there were several questions of the testimony of the officer admitted subject to a motion to strike. At this time I move the Court that all of the testimony of the officer that was received subject to a motion to strike be stricken at this time. I am not asking your Honor to make the ruling at the moment—

The Court: I understand that.

Mr. Marcus: —but I wanted to say it for the record so that the record is complete.

The Court: The officer's testimony from about page 15 to approximately where?

Mr. Marcus: Yes, your Honor; until page 26.

The Court: Thank you. That is one motion.

Mr. Marcus: Now, your Honor, with respect to the evidence itself—and it appears through the entire transcript of this testimony—the officer was permitted to testify concerning the contents, in his opinion, of the empty—purportedly empty—capsules of gelatin. Your Honor gave a description of each one of them as they were introduced [fol. 175] in evidence, as your Honor recollects. Now, I say this to your Honor with respect to an objection to the receipt of those, not on constitutional grounds but on the general principle of law, that the Court does not take cognizance of nothing. In other words, we are asking the Court under the theory of law of *de minimus non curat lex* to deny the admission of all of the items that were sought or will be sought to be introduced in this case, because they concern absolutely nothing. The evidence itself with respect to their identification is absolutely without foundation.

At the termination of the officer's testimony, your Honor, as appears in this transcript, he was asked the final question, if I can find that here in the record, whether or not he could determine that these were the same capsules that he examined, and he replied that he could not. I can point that out to your Honor in just a moment. On pages 78 and 79 of the transcript, after going through considerable cross-examination in testing his memory because he testified that he had examined those capsules many months before, he was asked how many capsules he had examined, and he said many of them, I believe hundreds of them. He was asked the following questions, which I believe are pertinent with respect to the admission of these capsules in evidence:

"Q. By Mr. Marcus: Do you see these two supposed [fol. 176] capsules here?

"A. I do.

"Q. Is there anything on there to indicate that you examined them?

"A. No. There are no markings on there to indicate that I examined them.

"Q. How many examinations have you made of capsules of morphine?

"A. Several hundred.

"Q. Several hundred. And you have no identifying marks on these capsules, have you?

"A. Not on these, no, sir.

"Q. And you don't know whether you made any test on those or not, do you?

"A. They resemble the capsules I made tests on."

Now, your Honor, I suggest that that is so problematical after examining several hundreds, that the Court could give no credence whatsoever to the testimony concerning his examination of these particular capsules for the purpose of receiving those capsules into evidence.

"Q. Not whether they resemble them or not, I am asking you whether you do now state under oath that you remember making an examination of these capsules.

"A. I don't know whether these are the same capsules or not."

[fol. 177] Now, I suggest, your Honor, that on that ground the capsules should not be received into evidence.

Now, with respect to the other point, I want to supplement for a moment Mr. Ring's very, very able argument to your Honor. In addition to what he said, this case transcends the mere defense of a poor Mexican boy by the name of Rochin charged with the possession of a narcotic. This case goes beyond the principles involved in securing evidence by the means of which it was secured here. This case goes beyond the efforts, we will say at least, of officers in attempting to get evidence into a case by whatever means they, themselves, as officers, feel should be used in order to secure a conviction.

In this case we are not simply concerned with Mr. Tony Rochin. In the broader and larger sense, your Honor, we are concerned with the enforcement of the laws of this State. Either we are going to have a government, of which these officers are the enforcement agents of that government, of law; or we are going to have no government at all, because the government then is by men and not by law. It is better, your Honor, even if Rochin be guilty of that offense, that he go free, because we are enforcing the law, we are not enforcing the will of man upon another man, than he should be convicted in the manner in which this boy is sought to be convicted in this case.

I know, your Honor, that the responsibility is great, the [fol. 178] responsibility resting upon your Honor's shoulders; but I believe your Honor is equal to it. I have known this Court for many, many years prior to the time that I practiced law, and I have the utmost of respect for your Honor's responsibility in this case.

It might be easier, if there were a jury here, for a jury of twelve persons to divide the responsibility and say, "Guilty," and away with it. For that reason, your Honor, I waived the jury, because I wanted the point to be attacked directly and once and for all settled in this State upon a direct issue as to whether or not evidence illegally obtained can be used in a criminal proceeding.

This case of Mayen, upon which the law-enforcement agencies of this State have for so many years past relied upon, and has by, we will say, innuendo been followed for years gone by, since its decision, to my mind rests on a

fallacy which should not be perpetuated in this State any longer or not be enforced by the courts in any further judicial proceedings.

If it be true that a man, as in this case, can be subjected at least to an operation to the extent that they can insert chemicals in his stomach to extract that which the officers think and believe is there, what can the officers do and how far can they go to extract it in a different method? Suppose they felt that it might be pulled out of him. Would it not and could it not be argued by the same principle [fol. 179] that he could be placed on the rack and the evidence extracted from him in that manner? Now, that has been frowned upon and that has been dispensed with in our judicial jurisprudence so it no longer can be used.

Now, we don't know what went into that chemical or compound that was used to be inserted into that man's stomach. He officer did admit, and it is in the record, he used a white substance which would cause the matter to be expelled from the man's stomach. It is the procedure that has been followed in this case that we are asking the Court to frown upon and not to put its brand of approval upon. We must stop some place. This creeping in and this boring in and, as Mr. Ring has ably stated, this terming of the principles of our Constitution, whether it be by way of the Fourteenth Amendment or by way of the Fourth and the Fifth Amendments, makes no difference whatsoever.

This matter has come before our federal courts before, this method of extracting evidence by invasion of the privacy of an individual. If they can go so far as to state in the federal courts that you must have a search warrant to go into a man's home and take a paper out of his files, well, surely the law would stigmatize itself if it permitted, as is sought to be done in this case, the officers to go into a man's stomach to extract evidence. Where is that going to stop? I need not go into the realm of supposition so far as that is concerned to suggest what could be done if [fol. 180] we are going to let this stand. It must be stopped. This ugly head of taking the law into the officer's own hands has got to stop, and it should stop now. I think that your Honor should make it emphatic enough in your

ruling so that its ugly head cannot come again into our system of judicial procedure.

Now, so far as the evidence is concerned, I want to take that up later, if your Honor should admit any of this evidence in the record, on a motion to dismiss; but with respect to the other matters, I believe I have covered it, and I think that——

The Court: You raised some point the other day when the matter was first up, I believe, at least it is raised in Mr. Ring's extensive amicus curiae brief, that it was violative of the Fifth Amendment; namely, compelling one to be a witness against himself, as well as violative of the Fourth Amendment, claiming that it was inadmissible because it was a violation of an unreasonable search of the defendant. Now, neither one of you have in your oral argument made any mention of the Fifth Amendment. Are you still standing on that, are you waiving it, or what?

Mr. Marcus: No, your Honor, we will stand upon it. I wanted to take that a bit further, and I was going to do it at a later time, but as your Honor——

The Court: I think right now is the time to do it because the two questions are very, very closely related if [fol. 181] not, you might say, intertwined.

Mr. Marcus: I was going to go a step further, because I believe that the Fourth and the Fifth Amendment are entwined on the basic principle of both our State and Federal Constitutions and our basic law of this State and Nation, that a person is entitled to a fair trial. Now, to say that by extracting evidence from him and using it against him that he is given a fair trial, is to beg the issue and to deery the very purpose of the law itself. If it is not compelling a man to testify against himself when you subject him to what this man was subjected to—even from the words of the officer himself that he was bound with a leather strap, in handcuffs, and a tube inserted into his throat and then the evidence extracted from him—then what is there to the basic principle of a fair trial? That evidence came from that method. He was compelled to give that testimony, and that is the testimony that they are attempting to use to convict him of this offense.

Now is that what you would call or I would call or the prosecutor would call a fair trial, to come in under those

circumstances and offer that evidence, extracted in that manner, as proof against him? Now, I suggest, your Honor, to argue the point is to beg the issue. Obviously he was compelled to testify against himself. Does that mean he is compelled to give testimony against himself by mere lip service? He was compelled to testify against himself because the evidence was extracted from him and [fol. 182] used against him. There is some semblance of suspicion, at least in one of these cases, that says that there must be a verbal, a mouthing of testimony—

The Court: Or writing.

Mr. Marcus: —or writing, in order to come within the purview of the section that your Honor has suggested; that the mere extraction from him of this evidence without his using words to express his thoughts would not come within the purview of that section. Now, how utterly ridiculous to argue that point is beyond my imagination. My goodness, if a man's conviction is predicated upon that very evidence that they have forced out of him and if a man in the face of accusatory statements can keep silent and that silence can be used as some degree of evidence that he should have denied it or made some comment about it during the time of those accusatory statements, how much more true is it when a person has actual evidence upon which the entire basis of the prosecution is predicated used against him in a court of justice? I say it goes beyond the Fourth and the Fifth Amendments, it goes to the very basis of a fair trial.

The Court: And therefore within the Fourteenth also?

Mr. Marcus: And therefore within the Fourteenth Amendment to the Federal Constitution, and therefore binding upon the State, without asking that the first eight [fol. 183] amendments be binding upon the State. I think that is all that may be said about that, your Honor.

The Court: Mr. Ring; you devoted some pages, although not at great extensio, to the question of compelling one to be a witness against himself. I wondered if you did want to say a word about that or not.

Mr. Ring: I am glad you brought that up, your Honor. In the brief I cited a number of cases on that, but here is an illustration that occurs to me, that I think would be apt,

and it is right in line with what was held in the Boyd case, which has never been overruled and has been frequently followed. Now, let us suppose this: Suppose that instead of actually mechanically extracting this evidence from this man's stomach that the officers had taken him into the rack and prepared him for the operation, brought out the knives and skulduggery and the rest of the things that they use; and explained to him, "Here, so and so, we think that you swallowed some evidence that we want to use, in the form of narcotics. Now, here is the table, here are the butchers, here is the apparatus, and here is the strap to tie you down; and unless you tell us, admit right here and now and sign a writing to that effect we are going to put you on the table and do whatever is necessary with all this mechanics and all of this help and all of these men to get that evidence out, and then we will take it up into court after we have it analyzed and use that against you." Now, would [fol. 184] there be anybody in this day and age that would dare to come into court and say that if a man or if a defendant under those circumstances said, "All right, don't do it. I don't want to go through that. I don't know what this means. This might kill me, this might injure me for life. I don't know what you will do. I will sign it. Give me the paper and I will sign it"—would there be anybody that would have the heart or the temerity to say that that confession was not obtained under force, under the most barbaric type of force? Of course not.

Now, in the Boyd case—and here is one thing that I may not have mentioned that should be borne in mind about that—that wasn't strictly even a criminal case; but the Court ruled that the effect of it was to impose a penalty in a civil matter. That was a case under the old revenue law, and the law provided that in the event that the government made a claim against a man for revenue in a certain amount, if he didn't produce his records, turn them over to them to show to the contrary why, the government's complaint against him in court could be taken as confessed. Well, the result is, from that kind of a situation, that the accused or the defendant is between the rock and the whirlpool.

The Court: That is a nice way to put it.

Mr. Ring: Either way he is bound to be injured, and that

is exactly the situation the defendant would be in here. He either had to submit to that violation of his person or [fol. 185] sign what they wanted him to sign, to produce the evidence in the form of a confession that they thought, that they hoped that they could use in court; or else he had to submit to this other and then have the evidence brought in that way. If that is not compelling a man to be a witness against himself in a way that is more drastic and possibly more injurious to him personally than any confession that he would sign, I don't know. Those Fourth and Fifth Amendments won't mean anything if they could do that. I think the Boyd case answers your Honor's question.

The Court: Well, I think we will give you this afternoon to start fresh, Mr. Carr. Mr. Reporter has not even had a recess since 9:20 this morning.

Is 2:00 o'clock satisfactory, gentlemen?

Mr. Marcus: Yes, your Honor.

The Court: And for you, Mr. Ring?

Mr. Ring: I will be here.

The Court: And you, Mr. Carr?

Mr. Carr: Yes, that is satisfactory.

The Court: All right. 2:00 o'clock, please, gentlemen.

(Whereupon, at 12:00 o'clock noon, a recess was taken to 2:10 o'clock p. m. of the same day.)

[fol. 186]

Los Angeles, California,

Friday, October 28, 1949. 2:10 P. M.

The Court: People v. Rochin.

Well, Mr. Carr, I believe we have gotten around to your end of the argument.

Mr. Carr: May the record show the defendant present and represented by counsel.

The Court: That is right. Thank you.

Mr. Carr: If your Honor please, I am going to address my remarks first to the last motion which was made by Mr. Marcus in reference to the exhibits. Your Honor, I am addressing my remarks first to the exhibits which are exclusive of the narcotics, wherein Mr. Marcus stated that

the others were of no consequence and therefore should be excluded from the evidence. Insofar as those exhibits are concerned, which are in particular the spoon and the eye dropper or ~~stripper~~, your Honor recalls in that connection that the officer testifying as an expert testified that those utensils are used by individuals addicted to the use of narcotics in the administration of narcotics to themselves, that is, there is a hypodermic needle attached to the eye dropper, and by those means the narcotic is injected into the vein or artery of the individual; and that the spoon is used to heat some liquid in which the narcotic is dissolved. We state that those are admissible to show that the defendant was a person addicted to the use of narcotics, [fol. 187] and that the utensils are directed toward that fact, and thus they are admissible.

Insofar as the narcotics themselves are concerned, the chemist testified that he could not positively identify these two packets of heroin or these capsules in the cellophane paper themselves. However, I would like to direct your Honor's attention further if I may, to additional testimony, page 79, commencing at line 15. Now, this is the portion that follows what was read by Mr. Marcus. This is further direct examination:

"By Mr. Carr:

"Q. Now, these two capsules that you examined and you testified you received from Officer Jones, how did they come to you, were they in any container?

"A. Yes, sir, they were.

"Q. In what?

"A. They were in this small envelope marked 'Elwood L. Schultz, M. D.,' and were also—this small envelope was placed in this large envelope, Sheriff's Office envelope.

"Q. Exhibit No. 1 for identification. You examined two capsules that were handed to you by Mr. Jones that came in those?

"A. That is right.

"Mr. Carr: I will ask the Court to take judicial notice that the two capsules which were produced here [fol. 188] and offered for identification as Exhibit No.

I came out of this self-same envelope described by the officer.

"Mr. Marcus: That is not the point, counsel.

"Mr. Carr: Certainly that is the point.

"Mr. Marcus: The point is whether he knows he examined these two capsules.

"Mr. Carr: They came in a certain container. It goes to the weight rather than the admissibility.

"Mr. Marcus: No. The envelope might be admissible, but certainly not the contents as yet. I don't believe there is any foundation, but I am a little bit premature anyway, your Honor."

Thus ends that illuminating portion of the argument. In other words, if the Court please, the chemist rightfully and properly restrained himself from marking the particular two items which he examined, but he identified those two items as coming out of a particular envelope which he did identify. We submit, if the Court please, that as such, that they are admissible in evidence. As to what weight your Honor would give to it, that is something for the trier of the fact and surely is not open to any legal objection, as to competency, relevancy, and materiality. So much for the exhibits.

Now we come to what appears to be the gist of the argument here. First let me invite your attention, your [fol. 189] Honor, to the fact that the evidence at this stage of the proceedings indicates that the defendant voluntarily submitted himself to the stomach pumping. Now, I don't make any point of that. That is the state of the evidence at this time. However, we state to the Court that it is immaterial as to whether or not it was voluntary or involuntary, and, for the purpose of this argument and this argument alone, let us assume that it was involuntary.

Now with that assumption this evidence falls into two possible classifications: one, counsel has referred to it and your Honor has directed his attention and also referred to it, as it may fall within the classification of being a self-incrimination; in other words, against the constitutional provisions of both the Federal Government and the State Government and our statutes prohibiting any person to be a witness against himself. Secondly, that it is

the use of evidence which is procured by means of an unlawful search and seizure. It falls within either one of those two if it falls within anything.

Now, there are two points in the brief of Mr. Ring that I would like to invite your attention to, if I may. On page 12 of the brief Mr. Ring states:

“Recent federal cases further hold that a search incident to a legal arrest without a search warrant is illegal where such warrant could have been reasonably obtained . . .”

[fol. 190] The Court: Will you start over again, please?

Mr. Carr: I will read this again, if I may. Page 12 of the brief, which is in the first paragraph:

“Recent federal cases further hold that a search incident to a legal arrest without a search warrant is illegal where such warrant could have been reasonably obtained . . .”

Now, let's discuss that one. Let us assume for a moment that a search warrant was necessary. Now, there must be a line of demarcation some place. Assume this: assume that the officers said to the defendant, “Now, we know that you have swallowed something; we have reason to believe that what you have swallowed is contraband. Now, the law requires that we get a search warrant before we can secure that contraband.” Now, your Honor, keep this in mind. I am not conceding that a court could lawfully order a man's stomach pumped, but let us assume that you could order that. All right. The officer will say to the defendant, “All right, now, you wait here, or I will keep you in my custody until I can go and prepare an affidavit, route a judge out of bed, or find some judge with jurisdiction to sign the search warrant; and then we will go ahead and get the search warrant and we will pump you.” Now, assume that the defendant or the accused is docile and he waits, but there is nothing that he can do to inhibit the natural processes of nature, which is the digestive system. Now, narcotics are a matter or [fol. 191] substance which can be and are assimilated by the human system. They are digested by the stomach,

they can be assimilated through the blood stream and elsewhere. Now, by the time the search warrant is obtained, you end up with nothing; an enema won't even do you any good in securing the evidence because that matter is gone long before it reaches the stage where an enema can withdraw it; so that we find ourself possibly in the situation of the legal proverb which states that where the reason fails the law must fail.

Now, let us go to the evidence of self-incrimination. There are two cases which I am going to cite and read to your Honor, which speak both of the self-incrimination and of search and seizure jointly.

The first case, and the last one on that subject, is *People v. Tucker*; of our appellate court, it is of the Fourth District. It is found in—

The Court: You are wrong in that.

Mr. Carr: Sir? What, the *Tucker* case?

The Court: About the Fourth District.

Mr. Carr: Yes. The Fourth District, is that San Bernardino-Fresno district?

The Court: Oh, yes, that is right; I guess it is. I was thinking it was Mr. Justice Peters' opinion. It is not; it is Mr. Justice Barnard's.

Mr. Carr: Mr. Justice Griffin wrote the opinion. This [fol. 192] case was decided on the 4th of November, 1948; *People v. Russell James Tucker*, found in 88 Cal. App. (2d) 340. Now, it is in the unbound edition, it hasn't been bound yet, and it is in Volume No. 4 of that.

Now, the *Tucker* case is a case wherein there was an automobile accident. The defendant was charged with a violation of 501 of the Vehicle Code. As a result of this accident the defendant was rendered unconscious. When he was taken to the hospital they withdrew some blood from his body for the purpose of making a blood chemical analysis—a blood-alcohol analysis to determine the alcoholic content of his blood. The point was raised in that case by the defendant that such evidence was inadmissible because it was without the defendant's consent.

I am reading from the ninth syllabus, which starts at 349:

"The third point involves the defendant's objection to the use of the doctors' testimony as to the alcoholic

content of the blood specimen. He objected to this line of testimony on the ground that the sample was taken without his consent or knowledge, and while he was suffering from shock and cerebral concussion, in violation of article I, section 13, of the state Constitution, and the Fifth Amendment to the federal Constitution, and sections 688-1323 of the Penal Code. In support of this contention he cites *People v. Strong*, [fol.193] *People v. Akens*, and *People v. Bundy*—

Your Honor, I won't give you the citations, because they are in the text that I am reading—

“Cases involving the admissibility of evidence as to scientific analytical tests for intoxication, based upon alcoholic content of the specimen of some bodily fluid such as blood or urine or of the breath, are correlated in 127 American Law Reports, page 1513. It would appear that upon the laying of a proper foundation such evidence is admissible.”

Citing a Connecticut case, a Wisconsin case, and this A. L. R. article.

“The admissibility of such evidence where the specimen of bodily fluid was taken ‘without his consent and where he was compelled to submit to such tests against his will and wishes’ is likewise discussed and it is generally held in other states that where the accused is compelled to submit to such tests against his will it violates his constitutional right in that he may not ‘be compelled to give testimony against himself,’ and upon proper objection such evidence is inadmissible. Other cases hold that where there is no evidence of compulsion or entrapment such evidence is admissible.”

Citing an Iowa case, an Ohio case, and a New York Supp. (2d Series).

[fol. 194] “The cases cited by the defendant hold to the general rule that a defendant may not be compelled or required, against his consent, to submit to an examination by a physician. Our attention has not been called to any California case directly involving

the point here raised. However, *People v. Mayen*—the good old Mayen case—“188 Cal. 237, presented the question of the admissibility of certain evidence obtained from defendant other than by lawful search warrant. It was there held that the Fourth Amendment to the Constitution of the United States, relating to searches and seizures, only applies to the Federal Government and its agencies; and that where competent evidence is produced on a trial the courts will not stop to inquire or investigate the source from whence it comes or the means by which it was obtained; and that the seizure by officers of the law of private papers and effects by unlawful and unauthorized entry and search, to be used as evidence in criminal prosecutions of the persons from whom taken, is a violation of the constitutional right to security against unreasonable search and seizures, but the subsequent use of articles so taken as evidence is not itself any part of the unlawful invasion of such constitutional guaranty.

“*People v. One 1941 Mercury Sedan*, 74 Cal. App. [fol. 195] (2d) 199”——

Incidentally, I am going to read from that case; however, I will continue on from the Tucker case——

“held that in a proceeding for forfeiture of an automobile used for transportation of marijuana, wherein it appeared that the driver on his apprehension had swallowed some brown paper which he had in his hand, evidence as to the narcotic content of the substances pumped from his stomach was not privileged under Constitution, article I, section 13, and should have been admitted, since such evidence did not depend on the testimonial utterances”——

Now, that emphasis is not only mine; but it is the emphasis of the court in writing this opinion——

“testimonial utterances of the driver for its probative force; and that the privilege against self-incrimination does not preclude the introduction of physical disclosures a defendant is forced to make or the results of tests to which he has involuntarily submitted; that the privilege only protects the individual from any forced

disclosures made by him, whether oral or written; and that it is limited to the protection against testimonial compulsion."

So that we see in the case before your Honor that it does not fall within the category of self-incrimination because there is no testimonial utterance, there is nothing in [fol. 196] writing by the defendant that he was compelled to do; he was merely forced to disgorge certain matters which he had within his stomach.

"*State v. Cram*, 176 Ore. 577, is factually similar to the instant case and the same question was there presented. It was there said that the admission of testimony concerning the alcoholic content of a blood sample taken from an automobile driver following an accident and at a time when he was unconscious and under arrest and where there was a subsequent prosecution for manslaughter based on death as a result of such accident, it was not a violation of defendant's constitutional privilege against self-incrimination.

"Under the circumstances here related it cannot be said that the trial court erred in overruling defendant's objection to the admissibility of such evidence."

Now, if I may, your Honor, I would like to read to the Court from this forfeiture case which is referred to in the Tucker case and which I invited your attention to. It is *People v. One 1941 Mercury Sedan*, 74 Cal. App. (2d) 199. That opinion is of the First District, and Mr. Presiding Justice Peters wrote that opinion. Briefly the facts were these, if the Court please: This is a forfeiture case; the individual concerned, one Williams, was driving an auto- [fol. 197] mobile, this particular car involved, at the time he was approached by certain officers; as they approached, they noticed a brown paper in his hands, and the defendant placed the paper in his mouth and swallowed it. They did as the officers did in the instant case before you, they hustled him over to a doctor and pumped out his stomach, and, lo and behold, this brown paper was found to contain marijuana. In view of the law that authorizes the confiscation of an automobile used in the transportation of narcotics, the State commenced an action to confiscate and forfeit this particular automobile.

When the action was tried in the lower court, the trial judge there sustained an objection to the introduction of this evidence that was extracted from the stomach of Mr. Williams. As a result the State lost the forfeiture. The State took the appeal, and in this case the appellate court overruled the lower court, the Superior Court, and rendered this opinion. I am starting to read about the middle of the second paragraph on page 202. It is rather a lengthy one, I will forewarn your Honor so that you may properly relax and give your undivided attention, as I know you will:

“... The basis of the claimed forfeiture in such cases is the use of the car in violation of the statute. Such offense likewise is a criminal offense insofar as the persons in the car who are transporting narcotics are concerned. This being so, for the purposes of this [fol. 198] appeal, and without now deciding the question, it may be assumed that the same rules apply, so far as the admissibility of the rejected evidence is concerned, as would apply were this a criminal charge against Williams.”

In other words, the appellate court views this as a criminal proceeding, as the instant case before the court.

“In the second place, the question of the legality of the methods used to secure the evidence need not here be discussed. Whether the officers and doctors involved were guilty of an unlawful search and seizure, whether they were guilty of an assault, whether they could be held civilly liable in an action for trespass or for a violation of Williams’ right of privacy are matters not involved on this appeal. For the purposes of this appeal it may be assumed, without deciding, that the proffered evidence was secured illegally.”

The same assumption that I am proceeding under here before you, sir.

“Whatever our views may be as to the propriety of officers of the law using illegal means to enforce the law, the rule is now settled in this state, contrary to the rule prevailing in the federal courts and in some

states, that where competent evidence is produced on the trial the courts will not permit an inquiry into its [fol. 199] source or the means by which it was obtained. In other words, illegally obtained evidence is admissible on a criminal charge in this state."

The good old *Mayen* case, then *People v. Gonzales*, and the famous bookmaking case of *People v. Kelley*, 22 Cal. (2d) 169; a case, incidentally, which your Honor and I have had previous occasion to investigate into, concerning the use of telephones and transcriptions.

"This court is bound by the rule of these cases.

"The third factor to be kept in mind is that this is not a proceeding to compel a defendant by court order to submit to a physical examination or to an operation. Of course, if that would constitute an illegal search or seizure no court would or should give a court order to permit an illegal act. Nor in this case are we presented with any question relating to the right of the state to interrogate Williams under section 2055, Code of Civil Procedure, or otherwise. We are here presented with a case where evidence was produced clearly relevant on the issue involved. That evidence in no way depends for its introduction on the credibility or testimony of Williams. It is sought to be introduced through the testimony of the police inspector and doctor who secured that evidence. The problem involved [fol. 200] is whether the trial court correctly ruled that the introduction of such evidence would be in violation of article I, section 13, of the state Constitution, which provides in part that: 'No person shall be . . . compelled, in any criminal case, to be a witness against himself.' The specific question to be decided is whether this section prohibits the introduction of this otherwise competent and relevant testimony.

"There is a hopeless conflict on this subject. There appears to be no California case directly in point. Many of the cases that hold that such evidence is not admissible are from states where illegally secured evidence is not admissible."

That is the majority and federal rule.

"Many courts have confused the two questions and, although they frequently discuss the privilege against self-incrimination, the real basis of their opinions is that illegally secured evidence is not admissible. Other cases that hold that the privilege against self-incrimination would be violated by admitting such evidence involve the question as to whether the prosecution by court order can compel the defendant to undergo tests or operations—an issue outside the scope of this appeal. But even when these classes of cases are excluded there [fol. 201] is still a conflict of authority on the specific question here involved. The solution to the controversy, of course, hinges upon the scope of the privilege against self-incrimination. The question is whether that privilege includes the right of the defendant to exclude evidence gained by physical examinations or tests made upon his body against his will, or whether the privilege is limited to testimonial utterances of the defendant, either written or oral. An examination of the many cases and legal discussions of the problem discloses that the weight of authority, particularly of the more modern cases, is to the effect that the privilege involved only protects a person from any unwilling testimonial disclosures and does not include the right to exclude testimony gained by forced examinations or tests. This conclusion seems inescapable when the history and purpose of the privilege against self-incrimination is considered. (See, for an excellent discussion of the history of the privilege, 8 Wigmore on Evidence (3d ed.) Section 2250, p. 276.) After exhaustively discussing the history and background of the privilege Wigmore states:

"Looking back at the history of the privilege and the spirit of the struggle by which its establishment [fol. 202] came about, the object of the protection seems plain. It is the employment of legal process to extract from the person's own lips an admission of his guilt, which will thus take the place of other evidence. Such was the process of the ecclesiastical Court, as opposed through two centuries,—the inquisitorial method of putting the accused upon his oath, in

order to supply the lack of the required two witnesses. Such was the complaint of Lilburn and his fellow-objectors, that he ought to be convicted by other evidence and not by his own forced confession upon oath. . . .

“ ‘In other words, it is not merely any and every compulsion that is the kernel of the privilege, in history and in the constitutional definitions, but testimonial compulsion. The one idea is as essential as the other.

“ ‘The general principle, therefore, in regard to the form of the protected disclosure, may be said to be this: The privilege protects a person from any disclosure sought by legal process against him as a witness.’

“ ‘In section 2265, page 374, the author reaches the following conclusions on the specific problem here involved:

“ ‘If an accused person were to refuse to be re-[fol. 203] moved from the jail to the court-room for trial, claiming that he was privileged not to expose his features to the witnesses for identification, it is not difficult to conceive the judicial reception which would be given to such a claim. And yet no less a claim is the logical consequence of the argument that has been frequently offered and occasionally sanctioned in applying the privilege to proof of the bodily features of the accused.

“ ‘The limit of the privilege is a plain one. From the general principle it results that an inspection of the bodily features by the tribunal or by witnesses cannot violate the privilege, because it does not call upon the accused as a witness, i. e. upon his testimonial responsibility. That he may in such cases be required sometimes to exercise muscular action—as when he is required to take off his shoes or roll up his sleeve—is immaterial,—unless all bodily action were synonymous with testimonial utterance; for, as already observed, not compulsion alone is the component idea of the privilege, but testimonial compulsion. What is obtained from the accused by such action is not testimony about his body, but his body itself. Unless some at-

tempt is made to secure a communication, written or oral, upon which reliance is to be placed as involving [fol. 204] his consciousness of the facts and the operations of his mind in expressing it, the demand made upon him is not a testimonial one. Moreover, the main object of the privilege is to force prosecuting officers to go out and search and obtain all the extrinsic available evidence of an offense, without relying upon the accused's admissions. Now in the case of the person's body, its marks and traits, itself is the main evidence; there is ordinarily no other or better evidence available for the prosecutor. Hence, the main reason for the privilege loses its force.

“Both principle and practical good sense forbid any larger interpretation of the privilege in this application.” (See, also, for an interesting article on the subject, where many cases are collected and the same conclusion reached, 17 Minn. L. Rev. 187.)

“The cases are collected and commented upon in 22 Corpus Juris Secundum, page 993, section 649. At page 994 the following conclusions, supported by many cases, are set forth: ‘While some authorities have extended the privilege against self-incrimination to compelling accused to do any act against his will which results in evidence tending to incriminate him, and accordingly hold that evidence so produced or dis- [fol. 205] covered is incompetent, the more general view is that the constitutional guaranty renders incompetent only such evidence as is furnished or produced by accused under ‘testimonial compulsion,’ such as disclosures obtained by legal process against him as a witness, or, as otherwise stated, that it extends only to communications, written or oral, on which reliance is to be placed as involving accused's consciousness of the facts and the operation of his mind in expressing it. The test of admissibility under the majority rule has been said to be whether the proposed evidence depends for its probative force on the testimonial responsibility of accused, or has such force in itself, unaided by any statement of accused.’

“The overwhelming number of cases hold that the mere fact that the evidence, other than testimonial

evidence, had its origin with defendant, even where taken against his will, is no ground for its exclusion. Practically every modern court holds that the accused can be compelled to stand in court for purposes of identification, and that his fingerprints, footprints, photographs and clothing, even where taken against his will, may be admitted, where relevant, without violation of the privilege in question. A few typical cases will suffice to demonstrate the point. In *Holt v. United* [fol. 206] *States*, 218 U. S. 245, a defendant, under duress, was compelled to put on a blouse, and at the trial a witness other than the defendant testified that the prisoner put it on and it fitted him. This testimony was objected to upon the ground of the constitutional privilege. The Supreme Court said: 'But the prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof. Moreover, we need not consider how far a court would go in compelling a man to exhibit himself. For when he is exhibited, whether voluntarily or by order, and even if the order goes too far, the evidence, if material, is competent.' "

That is the United States Supreme Court.

Then there is *People v. Sallow*, a New York Sup. case.

"... the defendant contended that by requiring her to have her fingerprints taken, and the receipt in evidence of such fingerprints, she was required, in violation of her constitutional rights, to be a witness against herself in a criminal case. The court said: 'The taking of finger prints is not a violation of the spirit or purpose of the constitutional inhibition. "The scope of the privilege, in history and in principle," says Greenleaf, "includes only the process of testifying; by word of mouth or in writing; i. e., the process of disclosure by utterance. It has no application to such physical, evidential circumstances as may exist on

the witness' body or about his person." It would be a forced construction to hold that by finger printing the defendant was required to furnish evidence against herself.'

"Another interesting case is *State v. Barela*"—a New Mexico case—"where the sheriff, against the will of the accused, compelled them to remove their shoes for purposes of comparison with prints found at the scene of the crime. At the trial the sheriff was permitted over objection to testify as to the result of these comparisons. The Supreme Court of New Mexico stated: 'The provisions against self-incrimination are limited to testimonial compulsion under process of some kind directed against the defendant as a witness. It does not and cannot logically apply to actions of the defendant under compulsion of persons or officers without judicial sanction. In such cases the physical facts speak, not the defendant as a witness.' After refer-[fol. 208] ring to a few cases that hold to the contrary the court stated that those cases follow a minority and unsound doctrine. At page 548 it is stated: 'They allow the fact that the evidence was illegally obtained to control its admissibility. As before seen, this has nothing to do with the matter. The test is as to whether the evidence is compulsorily given by the defendant under process as a witness. The question as to whether it is the result of an unlawful search or seizure, or whether it is obtained by force or intimidation of private persons or officers, not under sanction of judicial process, ordinarily has no effect whatever upon its admissibility.'

"In *State v. Aspara*,"—a Louisiana case—"an exception was taken to the ruling by the trial court in allowing state witnesses to examine certain clothing taken from the defendant after his incarceration, with a view of identifying it as that worn by him at the time of his arrest. One of the grounds of the exception was that it would be equivalent to compelling him to give testimony against himself in a criminal case. The court stated that the objection was properly overruled, and held that incriminating articles may, if relevant,

be used in evidence against the accused, though forcibly, irregularly, or illegally taken out of his possession. In *State v. McLaughlin*,"—a Louisiana case—"a detective was allowed to testify that on the day of defendant's arrest, which was the date of the homicide he, with another detective, visited defendant and took certain scrapings from his fingernails; that he placed the scrapings together and turned them over to the assistant chief of detectives. The scrapings were taken in order to ascertain whether they contained human blood. It was shown on the trial that they did."

The Court: That is interesting. That happened in the Lloyd case in this court this year.

Mr. Carr: That is correct, your Honor. It has happened in a number of cases, likewise.

"The court on appeal held that the testimony was properly admitted and violated no constitutional right of the defendant.

"In *Ross v. State*,"—an Indiana case—"the defendant was accused of robbery. Before trial he was produced before a prospective witness for identification, with a handkerchief over his face and when he had a beard of several hours' growth. The appellant contended that this amounted to a violation of his privilege against self-incrimination. The court held that the rule did not apply to pretrial efforts to identify [fol. 210] a suspect as the probable perpetrator of a crime even though those efforts involve physical examination or observation of the suspect against his will. The court, after quoting from *O'Brien v. State*"—an Indiana case—"stated: 'We think that *O'Brien v. State* properly limits the privilege against self-incrimination to testimonial compulsion, i. e. a defendant cannot be required to be a witness in his own trial, nor can another person testify under such circumstances that he is a mere "mouthpiece" of the defendant; the defendant being the "real witness." The privilege does not embrace testimony of a witness other than the defendant unless such testimony results in getting

before the jury evidence which rests upon the testimonial responsibility of the defendant.'

"In *People v. Jones*, 112 Cal. App. 68, the defendant claimed that the evidence of his fingerprints was improperly admitted, being in violation of his privilege against self-incrimination. There was no evidence that the fingerprints were taken by force. The court held the evidence admissible, and, after quoting from the case of *People v. Sallow*, *supra*, stated: 'While our attention has been called to no California cases upon this point, the introduction of such evidence is supported, not only by long established, but, in our [fol. 211] opinion, by the better reasoning. As pointed out in the case just referred to, such evidence is not the evidence of the defendant, but is the evidence of a competent witness, and while it is based upon an examination of the defendant, it is no more inadmissible than would be the testimony of one who testified to the existence of a scar.'

"Many other cases could be cited to the same effect. There are some cases to the contrary." Citing *Iowa*, *Missouri*, *Missouri*, *Arkansas*, and *Michigan*. "These cases are far in the minority and have been subjected to criticism. (See 8 Wigmore on Evidence (3d ed.))

"Coming now directly to the question of the admissibility of tests or operations made upon the defendant against his will as distinguished from physical identification evidence the majority of cases find no legal distinction between such evidence and the various types of physical identification evidence heretofore discussed. It is true that there are some cases refusing admissibility to evidence, forcefully secured, that the defendant was suffering from a venereal disease, where that evidence is relevant. (See in particular *People v. Corder*, *supra*; *State v. Height*, *supra*.) But [fol. 212] the majority of courts have held that the privilege against self-incrimination is not violated by producing in court through witnesses other than the accused the results of medical examinations, even where done forcefully. A few typical cases will suffice to illustrate the point. In *State v. Gatton*, 60 Ohio App.

192, the question arose over the admissibility of evidence as to the refusal of the defendant to submit to a blood test or urinalysis where he had been charged with operating a motor vehicle while intoxicated. The evidence was admitted and he was convicted. On appeal he contended that the admission of such testimony violated the privilege against self-incrimination. In holding that the privilege was limited to disclosure by utterance the court stated: 'It will be observed in the instant case that the evidence offered was not required to be given by the defendant himself, but was given by the deputy sheriff and the doctor called by the deputy to make the examination of defendant. We are unable to observe any merit in the defendant's claim that the introduction of such evidence violated his constitutional rights, and we believe, and hold, that the constitutional inhibition against self-incrimination relates only, as stated by Greenleaf, to disclosure by utterance. No such disclosure was required of defendant in this case.' " Citing again the 24 Minnesota Law Review article.

"The case of *State v. Cram*"—an Oregon case—"is one where the defendant was charged with manslaughter committed while under the influence of intoxicating liquor. The accused was rendered unconscious by the accident; and while still unconscious he was arrested and a sample of blood was taken from him for the purpose of having it analyzed to determine its alcoholic content, if any. At his trial the doctor testified as to such content. The court on appeal held the evidence was admissible and stated:

"We need not consider how far a court will go in requiring a man to submit to a blood test. See *Holt v. United States, supra*. Here the blood has already been extracted; defendant is not being called upon to submit to an examination.

"The defendant was not deprived of any of his constitutional rights by the admission of the testimony here in question. He was not compelled to testify against himself. Evidence of the result of the analysis of the blood sample was not his testimony, but that of Dr. Beeman, distinct from anything the defendant may

have said or done. The blood sample was obtained without the use of any process against him as a witness. [fol. 214] He was not required to establish the authenticity, identity, or origin of the blood; those facts were proved by other witnesses.'

"In *State v. Duguid*"—an Arizona case—"involving the admissibility of a urinalysis, but where there was no compulsion, the court . . . discussed the problem as follows, quoting from *Lee v. State*"—another Arizona case: " . . . It may be doubted if the constitutional privilege now invoked was ever intended to exempt an accused from an exposition of physical or natural marks or distinctions or characteristics, such as tracks, footprints, stains, and finger prints. 4 Wigmore on Evidence. The learned author thinks the privilege against self-crimination should be confined to testimonial utterances. As was said in *State v. Graham*" " " "—a Louisiana case:

" " " "The tendency of the more modern case is to restrict the constitutional privilege against compulsory self-crimination to confessions, and admissions proceeding from the accused, and to open the door to the reception of all kinds of "real evidence" or proof of physical facts, which speak for themselves." " " " "

Now, if I may interpose, if the Court please, California doesn't even go that far. California law holds, as I understand it, that only a confession must be free and voluntary and not be brought about by duress or undue influence of any compulsion whatsoever; that an admission may be introduced in court even though those factors were present, that it was brought about by force and violence, that it was involuntary, and that it was brought about by promise of reward or immunity.

"A case quite similar, factually, to the instant case is *Ash v. State*," Texas Criminal Reports. "There the accused, who had been charged with receiving stolen property, swallowed several of the stolen rings. He was taken to the hospital and the rings located by fluoroscopic examination. Against his will and over his vigorous objections he was compelled to submit to

an enema, and the stolen property thus recovered. This property was identified and produced in evidence at his trial over his objections . . ."

Your Honor apparently had in mind this case when you cited it this morning. Apparently, if you are going to draw parallels, the Texas court held that a tube introduced at one portion of the anatomy did not violate the rights; so, hence, if the tube was introduced in another portion of the individual's anatomy, as in this case, why would it violate the rights?

" . . . He was convicted and appealed, contending the privilege had been violated. The court stated: 'It [fol. 216] will be noted from the fact of this case that the officers had information pointing to the appellant's guilt; that after he came under their observation they saw him place a metallic object in his mouth which they took to be the rings in question, or one of them. This proved to be correct. His possession of the rings and secreting them in the presence of the officers is the gist of the offense. He was, therefore, committing a felony in their presence. This gave them a legal right to arrest him and search his person.' " Citing two more additional cases. " 'Where then should they end this search? If the rings remained in the appellant's mouth, they would have had as much right to search his mouth and secure the rings as if they were in his pocket. He swallowed them. They determined this by seeing him make three or four efforts to swallow something, which took place in their presence and which warranted them in continuing their search. There is no contention that the officers resorted to any cruel or inhuman method of determining the presence of the rings, nor in extracting them. They applied the most approved method of doing so. Under the directions of a skilled operator they located the rings in the appellant's bowels. Could it be said that if a thief has stolen property, sewed it up in his pocket, or in the lining of his coat, that the officers would [fol. 217] have no right to cut the stitches or even to injure his clothing for the purpose of securing the valuables belonging to another and that when they did

so there would be a question about the admissibility of the evidence thus obtained? The evidence is replete with the conduct of the appellant in fighting the officers physically resisting every effort made by them to procure the rings, but there is no evidence to indicate any cruelty or unusual treatment on their part in doing so. They gave him an enema, a very normal and natural thing to do, thereby extracting the rings which the appellant had chosen to secrete in this most unusual manner. If the act of the officers should be considered unusual, it was brought about by reason of the act of the accused party. We think that the officers had a legal right to arrest appellant and to search him and to continue that search to such a reasonable degree as to permit them to ascertain whether or not the appellant possessed the stolen property, which they had a right to believe he had.'

"The modern and majority rule has been approved by the Model Code of Evidence drafted by the American Law Institute. Rule 205 (p. 136) reads as follows:

"'No person has a privilege under Rule 203 to re-[fol. 218]-fuse

"'(a) To submit his body to examination for the purpose of discovering or recording his corporal features and other identifying characteristics, or his physical or mental condition, or (b) to furnish or to permit the taking of samples of body fluids or substances for analysis.'

"The rule is followed by this comment: 'This Rule like Rule 201 adopts the doctrine of the better considered cases that the privilege against self-incrimination applies only to prevent testimonial compulsion and has no application to compulsory exhibition of the body. A number of decisions have held that a compulsory physical examination of a defendant over his protest, for the purpose of determining his physical condition, is a violation of his constitutional right and that evidence discovered by this means is not admissible against him. Some cases dealing with evidence of finger-prints avoid the issue by finding a

waiver of privilege by failure to object. The trend is, however, strongly toward the view expressed in the Rule. The legality of the practice of taking Bertillon measurements and finger-prints and other records of identifying characteristics of a person under legal arrest is expounded in *United States v. Kelly*. "This is a federal Circuit Court of Appeals case. "The [fol. 219] same principle is applicable to Clause (b). This Rule deals only with the privilege against self-incrimination, and leaves entirely open the question whether any other rule of law protects a witness or party against invasion of an asserted right to freedom from interference with his person."

"In line with the weight of authority it is our opinion that the privilege against self-incrimination does not preclude the introduction of physical disclosures the defendant is forced to make, or the results of tests to which he has involuntarily submitted. It is our view that the privilege only protects the individual from any forced disclosures made by him, whether oral or written. It is limited to the protection against testimonial compulsion. The privilege protects the accused from the process of extracting from his own lips against his will an admission of guilt, but it does not extend to the exclusion of his body as evidence when such evidence may be relevant and material. The privilege is aimed at preventing the compulsory oral examination of the accused before or during trial. Experience of many years has demonstrated that when statements are extorted from an accused there is a strong likelihood that the extorted evidence would be [fol. 220] unreliable. But the reason for the rule no longer exists when physical evidence is considered. In the present case the evidence as to the narcotic content of Williams' stomach in no way depended upon the testimonial utterances of Williams for its probative force. Williams was not required to establish the identity, origin, or authenticity of the evidence, nor was he required in any way to testify concerning its analysis. This was done by other witnesses. Under the circumstances, for reasons already stated, the evi-

dence was not privileged and should have been admitted.

"Williams contends that whatever the rule may be in other jurisdictions, California has adopted the rule that such evidence, if not voluntarily given, is not admissible. In this connection he cites *People v. Gutierrez*, 126 Cal. App. 526, and *People v. Salas* 17 Cal. App. 2d 75. In the Gutierrez case the defendant submitted voluntarily to a physical examination to determine whether he had a venereal disease and such testimony as to the results was held admissible. The same result was reached in the Salas case, where an examination was made of the defendant's forearm without objection, and at his trial it was held that a properly qualified person could testify that the arm [fol. 221] showed scars as though made by a hypodermic syringe. The courts there held that results of physical examinations to which the defendants have voluntarily submitted are admissible. It seems to be the thought of Williams that because those two cases emphasized that the physical examinations there involved were voluntary they necessarily implied that the results of an involuntary examination would not be admissible. This is clearly a non sequitur. All that the courts were there concerned with was whether the results of voluntary examinations were admissible. They did not pass upon the question, because it was not involved, whether the results of an involuntary examination are admissible.

"The case of *People v. Akens*, 25 Cal. App. 373, so strongly relied upon by Williams, also is not in point. In that case the defendant was charged with the rape of a female under the age of consent. He was convicted of assault with intent to commit rape. The appellate court reversed the judgment, holding that the verdict was without the scope of the information. At the conclusion of the opinion the following appears:

"In the event of a new trial . . . it may be stated that the defendant cannot be required, against his consent, to submit to an examination by a physician. . . . Apparently, the prosecutor was there attempting to [fol. 222] secure a court order to compel such exami-

nation. As already pointed out, we are not here called upon to pass upon the legality of the methods used to secure such evidence, nor are we called upon to decide whether a court could or should order such an examination. The question here involved is whether the evidence relating to the narcotic contents of Williams' stomach, already obtained, and assuming, but not deciding, illegally obtained, was admissible. The legality of the methods used to obtain the evidence is not involved on this appeal. So far as the privilege against self-incrimination is concerned, that privilege was improperly invoked in the present case. Other remedies may exist to protect an accused from such acts, but the privilege against self-incrimination is not one of them.

"The judgment appealed from is reversed."

A petition for hearing by the Supreme Court in this case was denied, although Mr. Justice Carter and Mr. Justice Schauer voted for a hearing.

So this forfeiture case appears to be binding insofar as this point is concerned upon the Court. Much as your Honor may feel the unfairness, if any, in admitting evidence extracted from a defendant involuntarily—I don't mean testimonial utterances either oral or written, but [fol. 223] physical evidence—your Honor is in no position to do anything about it. These cases bind the Court as securely as the constitutional definition of jurisdiction binds you.

The attack by learned counsel here is upon the law of the State of California as it exists now. May I cite page 93 of counsel's brief, wherein he states: "*People v. Mayen* has stalked the State too long." Well, it is a remarkable piece of rhetoric, and maybe the case has. I don't know. But, in any event, it still stalks the State, it still stalks you, your Honor, and there is nothing that you can do about it. That is a matter which is out of your hands and a matter which the appellate courts if called upon must do something about if that law is to be reversed. In the last two opportunities which have been afforded them to reverse that, they have seen fit not to do so; they have

seen fit to follow the rule that they have previously laid down.

In one instance it is the majority rule of all of the States and the Federal Government, that is, against self-incrimination. This cannot be considered self-incrimination because it does not involve a testimonial utterance of the defendant, either oral or written. On the other hand, I submit, we do follow the minority rule; that the Federal Government and a majority of the States hold that evidence which is taken without a search warrant or due process of law cannot be subsequently used in a criminal proceeding against the person from whom it was taken; but [fol. 224] the fact remains, nevertheless, that the appellate courts of this State in their wisdom have seen fit to set down the rule starting with *People v. Magen*, on down through the many cases, *Gonzales* and *Kelly*, and there have been some subsequent ones even to that, to state that the trial court will not concern itself as to the manner in which the evidence is secured, but will only concern itself as to whether or not that evidence is material, competent, and has bearing upon the issue of the criminal proceeding before it.

In other words, if the Court please, as one of the newspaper men in discussing the matter with me in private stated, your Honor cannot be concerned how it got out of the defendant's stomach, your concern is how did it get in and what is it worth here in the trial before you. With that, I submit the matter to the Court.

The Court: Well, I think these other gentlemen are entitled to be heard by way of comment as to the *Tucker* case and the *1941 Mercury* case because those are matters that were not covered in their argument; but I am inclined to think it would be fair to limit you gentlemen essentially to comment upon those two cases.

Mr. Marcus: Yes.

The Court: Because nothing has been developed that you have not had a chance to be heard upon other than those.

Mr. Marcus: Your Honor, I am just going to say a few [fol. 225] words in reply to counsel's reading of the entire opinion of *People v. One 1941 Mercury Sedan*. Now, the appellate court does not have to go to the extent that

it did in rendering that decision. This was an in rem action against One 1941 Mercury Automobile, this was not a criminal proceeding. This was not a proceeding against an individual where his life or his liberty was at stake; it was simply a civil proceeding in rem against an automobile.

Now, as counsel stated here in his final words, that no person can be compelled to be a witness against himself in a criminal prosecution, that is an elemental principle of law. Now, the utterances of the appellate court in this automobile case are absolutely mere dicta so far as applicability in a criminal prosecution is concerned. For instance, confessions extracted from defendants. Why, in a civil proceeding those admissions could be made, no matter how secured from him; not in a criminal case where a person's life and liberty are at stake. That is the guard that is placed about us by the federal Constitution and the state Constitution. We are not concerned in a civil proceeding except as the Constitution itself guaranties certain rights, that no person's property shall be taken without due process of law. That is a guaranty in a civil proceeding. That has no application to a criminal prosecution such as this.

Now, counsel has cited that Texas case, and with due regard to the State of Texas and some other Southern States; those districts and those domains are the first ones that have violated every rule and principle of the state and federal constitutions in the State of Texas. Your Honor, what the rights and privileges of the minorities and the colored race are concerned with in the State of Texas, how many appeals have gone up to the Supreme Court of the United States from that State? To my mind the State of Texas opinion is the least of all, with respect to civil rights, that should be followed in this State of California.

In applying the rule against self-incrimination, your Honor, and the reasons given by the court in this One 1941 Mercury Sedan in attempting to give some justification for, at least, the minority rule, as counsel has seen fit to admit, there has been splitting of hairs, there has been an effort here to find some reason, maybe some semblance of logical reason, why that majority rule of the Federal Government in following the federal Constitution has not

been followed in the State of California; at least, in this civil action in rem in the automobile case.

Now, I say to your Honor that every rule of law must have some common sense to it. They gave the example of a person being fingerprinted and that was not a rule against self-incrimination because he had his fingerprints taken or a defendant sitting in a courtroom and his features being exposed to the jury or an examination of his nails; and I [fol. 227] believe your Honor said that something like that had taken place in this courtroom.

The Court: Yes.

Mr. Marcus: Now, certainly there must be some restraint, some common sense, some basis of common judgment to be used in every case. I don't suggest to your Honor that we are going to take the rule against self-incrimination to a ridiculous conclusion; I say this, your Honor, that the spirit and the intent and the purpose of the law against self-incrimination has never gone to the extent that in a criminal case a person can be compelled to submit to an operation or submit to the operation to the extent that this man was compelled to go to give testimony against himself. It simply begs the issue, it simply is ridiculous to assume that to subject him to the operation that he had to go through and did go through is not being compelled to give evidence against himself.

Now, suppose—just assume that a defendant was subjected to one of these stomach-pumping operations and they found nothing. What would counsel suggest about that then? What action would he have against the officers? Suppose it was an elderly man—and this was suggested to me by one of the newspaper men, too—suppose he was an elderly man, very old, and there was some suspicion that he had in his possession, whether narcotics or otherwise, but some contraband, was the word used, and they subjected that elderly gentleman to that process, and he had [fol. 228] ulcers of the stomach, and that resulted in his death and they found nothing. Now, I am suggesting these ridiculous situations, your Honor, because I say that the law itself must be read with common sense and common judgment. Where a defendant is sought to be convicted wherein his life or his liberty may be at stake upon the evidence procured in this manner, it is in violation of the state

and federal Constitutions. Now, if you want to go a step further and say it may not be an unlawful search and seizure but it certainly is a violation of due process under the Fourteenth Amendment, I don't care how you follow the reasoning, I am of the opinion exactly as Mr. Ring is, that the Fourth and Fifth Amendments apply to the States, too. But we don't have to go that far. I say that this matter of relying upon and drawing and parting hairs to say that it must come out of the lips of the individual is just begging the issue in its entirety.

Suppose, it might be suggested to the learned appellate justice here, that the man was dumb and he couldn't talk at all and he had to write it out or that he gave utterances or sounds of some kind and it wasn't cognizable to the ordinary layman and the confession came through some other means or sources. Would that mean that because of that it wouldn't be admissible or it would be admissible? Under counsel's reasoning, it would be admissible.

Now, I say, your Honor, counsel suggested to the Court [fol. 229] that where the reason for the rule fails, the rule fails itself, because you might have to go to a doctor or get a search warrant. Then he argues that surely the court—by the time, under the natural processes of digestion of the human anatomy, the evidence may have been lost, that he couldn't get the search warrant for search. He is begging the issue when he says that it shouldn't be required and an officer should not be compelled to get a search warrant.

Now, let's assume this, that two men are in a duel or two men are engaged in a shooting scrape, using the vernacular, and the aggressor has the advantage over the other and kills him; but in the process the aggressor is wounded, he is in a dying condition. The officers come upon the scene. By taking the example that counsel has said, that when the reason for the rule fails, the law fails, too; why, the officer could shoot the man right there and not permit him to have a trial because the man was dying, he would be dead anyway; so he might as well be shot by the officers. When you get to that point of reasoning you are getting away from our set of rules or laws which govern the conduct of the people of this country. When you get away from the rules of law and the rules of the Constitu-

tion and permit the officers to exercise or the enforcement agencies to exercise what they believe is the law, in violation of the Constitution, then you are getting away from a government of laws and making it a government of men, [fol. 230] and you are getting directly into the teeth of a different kind of a government than we have in this country today. It is a police state then and not a government of laws.

Now, getting down, your Honor, to this point of the use of this evidence here. For instance, counsel has suggested the use of that eye dropper. He has found an ordinary eye dropper, and ~~he~~ says that for the purpose of showing motive or intent that the court should admit the ordinary eye dropper in evidence because addicts may take the eye dropper and may take a needle, insert it on the end of it, and use it as a hypodermic needle. This is not a case where you must prove intent. The defendant in this case is charged with possession. This is not a case where you must show motive to predicate a conviction upon. It has no place in these proceedings. I suggest to your Honor that the possession of a spoon or the possession of an ordinary eye dropper found in the room where this defendant resided has no bearing, is irrelevant, and cannot assist the Court in determining whether or not he had possession of the narcotics claimed to be found in his possession.

Now, the last statements to your Honor addressed by the District Attorney were, to say the least, highly startling to me. He says, because of a judicial determination by an appellate court of a matter of this kind in a tivil proceeding, that your Honor can do absolutely nothing about it. [fol. 231] Now, that, to my mind, raised a bit of a challenge to this Court. I say this: If we have convinced your Honor, which I believe we have attempted, at least, to do, that this rule that has no basis, to my mind, in reason or logic for its existence, which the appellate courts of this State have said that are rules of evidence and not of substantial basic requirements of due process or unlawful search and seizure in violation of the federal and the state Constitutions, then I think and believe and I urge upon this Court to set a precedent in this State that the appellate courts should follow; and at least the Superior Courts of this State should follow, because if we are going

to permit this sort of practice to continue to exist, Lord help us, because we don't know where we are going and how far this transaction can take us.

Now, I think Mr. Ring wants to say a few words. I will bow in deference to him.

The Court: Is there something you would like to say with respect to the Tucker and the Mercury cases, Mr. Ring; those two?

Mr. Ring: One thing I don't want to do is to get myself involved with Texas or any of the Southern States. My wife has a way of finding out some of the things that I say, and I don't want to have any troubles at home.

The Court: What I am really interested in is any comments you have to make about these two cases that are [fol. 232] relied on by the prosecution.

Mr. Ring: Yes. Your Honor, let me say this, first, and I think it is important: All of these cases that were cited, of course, were cases that were decided before the Supreme Court of the last term. This case of *Wolf v. Colorado* came out definitely, unequivocally—although it intimated it in the Harris case before—this *Wolf v. Colorado* said definitely and unequivocally that the Fourth Amendment is binding on the State.

At the time of *Weeks v. United States*, that was the case that the Mayen decision primarily relied upon, they held definitely that the Fourth Amendment does not bind the States. Now, I say that that decision has taken away the foundation for the theory upon which the Mayen case was decided, because before that time our courts could say, "We are permitted to adopt any rule of evidence that we want insofar as the Fourth Amendment or, indeed, the Bill of Rights are concerned"; and it wasn't until recent years that they held that the law against self-incrimination as laid down by the federal Constitution also bound the States. So I don't think that any of these decisions before this change of front on the part of the Supreme Court of the United States are binding now at all upon this or any other court of this State; at least until the Supreme Court of this State says so.

Now, I also want to comment upon——

[fol. 233] The Court: Let me ask you this: Were it not for *Wolf v. Colorado*, would you look upon these two decisions as binding upon this court?

Mr. Ring: I wouldn't, your Honor, because of this fact, because I think they are wrong and I don't think that there is any rule that is stare decisis that binds any court to follow any other decision in any other case that it doesn't believe is right unless it happens to be a decision that has gone up in that same case on trial.

Mr. Marcus: Your Honor, pardon me. I wanted to ask this question: When your Honor referred to the two decisions, did your Honor mean the 1941 Mercury and the Tucker cases?

The Court: Yes.

Mr. Marcus: I don't know whether your Honor has read the Mercury case in full, but—

The Court: I can even tell you the man's name in it. Frank Williams is his name.

Mr. Marcus: But the opinion itself says it is not authority for criminal actions.

The Court: But they do say in there—Mr. Presiding Justice Peters in writing that seems to say that he would treat it as though it were a criminal case.

Mr. Marcus: May I read that to your Honor?

The Court: Yes.

Mr. Marcus: Counsel, I think, started after that [fol. 234] point.

The Court: All right.

Mr. Marcus: It says as follows:

"Such offense likewise is a criminal offense insofar as the persons in the car who are transporting narcotics are concerned. This being so, for the purposes of this appeal, and without now deciding the question, it may be assumed that the same rules apply, so far as the admissibility of the rejected evidence is concerned, as would apply were this a criminal charge against Williams."

Now, up to that point it is all right and the appellate court could have scratched out all the rest of it.

Mr. Ring: Well, there is no doubt in my mind but what the appellate court in that case undertook to adopt the criminal rule of evidence to that forfeiture case. That is what they attempted to do, all right.

The Court: In other words—

Mr. Ring: But that isn't answering your Honor's question. That is what I am undertaking to do.

The Court: Thank you.

Mr. Ring: I don't think, your Honor, that any trial court—and I am reminded particularly by a very able decision written by Judge Palmer several years ago on that injunction question involving a labor union where he said—he cited authorities, and I was very interested in it, I [fol. 235] read them, and I found that the authorities supported his decision—"The trial court is not bound by an appellate court decision that it doesn't feel is right or correct unless it happens to be a decision in that particular case. Of course, then it is the law of the case."

The Court: In other words, stare decisis—

Mr. Ring: It may be used for reference, it may be used for instructions, it may be used for guidance; but there is absolutely no fundamental rule that requires a trial court to follow decisions in other cases if it doesn't feel that those decisions should be followed.

Now, I think that it is going to be discovered when this matter gets up before the appellate court that this change that has been brought about through this *Wolf v. Colorado* is going to vitally affect all questions on this evidentiary matter.

Now, there is one other thing that Mr. Carr brought out that I think deserves some comment in connection with these cases, and that is this: He points out—and I commend him for calling to the Court's attention the decisions which have been laid down which support his position and which we are attacking; I don't know how he feels personally about it, and that isn't of any great importance—but he has done a good job in doing what he is supposed to do, and it is difficult, a difficult position. But, for instance, he quoted a rule there to the effect that the voluntary [fol. 236] testimony proposition only involves the spoken word or the written word and goes on to say that in the case of—by way of comparison—in the case of evidence taken out of the body of the defendant, it doesn't fall within any of those categories; he doesn't have to testify about them at all. Well, good heavens, let me ask you: Does a defendant have to testify about a confession to get it into

evidence after it is all written out and signed by him? It is there. If it is an oral confession, his testimony isn't in any way necessary to introduce it. They simply bring in the people, they say they heard him say it, and they usually testify it was free and voluntary, he was advised of all of his rights, and they go ahead. The defendant might just as well be in Peru as far as the introduction of that evidence is concerned, he doesn't have to be questioned about it.

Now, these other rules and these other propositions that are cited in that long decision by Judge Peters there are largely the result of Dean Wigmore's work, and his theory is that a great deal of liberality should be allowed in breaking down both the hearsay rule and in the admission of coercive testimony. I think that there can be a practical distinction drawn, your Honor, from the illustrations given and the ones that we have in this case. They say, for instance, that a defendant can be compelled to stand up in court and be identified, or that cases have held that he may be required to submit to a Bertillon measurement and that [fol. 237] the evidence of that measurement can be used against him. I don't agree with that. I don't agree with that, but they held that. But other things, identifying marks on his body, I suppose, if you carried that out to its logical conclusion, that this also would be permitted: There is a certain line of medical authorities which holds that you can identify parentage by a blood test, so that in a proceeding to enforce parental obligations or for a child that hasn't been born yet or for the purpose of proving that rape had been committed or for any crime of that sort, why; it would be perfectly proper for the doctors to enforce an examination of the defendant to get a blood test, it might be permissible to go to the mother and force her to submit to something that might result in an abortion to get evidence. As I say, I don't know where the end would be. But in these cases that condone the matter of requiring a defendant to stand up and be identified or to submit to these simple Bertillon tests and these things of that sort, there isn't any element of fear there at all; there isn't anything that the accused needs to be fearful of. He knows when he stands up no one is going to hurt him, as far as that is concerned. If he goes in and is measured, there is no element of intimidation involved there; but

when he is confronted with this sort of a situation, either submit to this kind of an examination so that we can get—"Either admit that you have got this evidence or that you did this thing or we will subject you to this," there is an [fol. 238] element of fear and intimidation there.

Now, in this last expression by the Supreme Court of the United States in the Adamson case, here is the way they stated the rule:

"The due process clause forbids compulsion to testify by fear of hurt, torture, or exhaustion. It forbids any other type of coercion that falls within the scope of due process."

I understand that medical science recognizes a certain phenomena that develops in certain persons under certain conditions—they have a name for it that I don't recall just at the moment—but where people do actually sweat blood. Now, to use an extreme illustration, suppose that a person was subject to that sort of phenomenon and suppose that the officers knew it and that they knew that it could be superinduced by keeping him in close confinement, subjecting him to various kinds of mental torture, though no physical torture; but if they kept him there long enough under that distress, why, he would start sweating blood; and they wanted to use the chemical analysis on this blood for the purpose of proving some fact against him in a criminal case. Could it be said then that that was not making him be a witness against himself? I don't think that is permitted, your Honor. I think that this case that I referred to before, of *Boyd v. United States*, fully answers [fol. 239] it. It is referred to in the Weeks case itself:

"The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its advantageous circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal se-

curity, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment . . ." in that English case that has been referred to in there.

Now, I don't think that you can use the common law rule here which limited coercive testimony to words and writings. They didn't have the scientific devices then that they have now. I think that the Fourth Amendment, where it secures the person against illegal invasion has to be read with the Fifth Amendment which secures the individual against becoming a witness against himself.

[fol. 240] Let me call your attention in conclusion to this one further fact: There isn't a word in the Fifth Amendment about the involuntary—the nature of the subject-matter of being a witness against yourself. It doesn't say it has to be oral, it has to be in writing; it says he can't be compelled to be a witness against himself. Now, that precludes, in my humble opinion, any kind of coercive testimony.

The Court: Well, the first thing this Court must remember is that it is a trial court and not an appellate court. I appreciate your very elevating suggestion, Mr. Marcus, that we might have a suggestion here that the appellate courts would follow, but I am afraid you are making the trial court a little more important in the legal setup of this State than the procedure would warrant.

In the second place, the Court must interpret the law as he finds it, not necessarily what he might be disposed to declare if he were entirely free and unencumbered by decisions and declarations of higher courts of a particular jurisdiction; or, to be a little more specific, I am not out of sympathy with a good deal of argument that has been presented here in behalf of the defendant. By that I do not mean to say, necessarily, that I would decide with them without perhaps a little further thought; but I have got to take the law as it seems to have been developed by the decisions.

[fol. 241] You referred, Mr. Ring, frequently and with complete propriety, to the Weeks case, a United States

Supreme Court case that was along about 1913 or 1914, I should say, and the fact that that decision said that evidence that was obtained through unreasonable search was not admissible in a federal court under the Fourth Amendment which provides against unreasonable search and seizure; was only binding upon the Federal Government and its agencies and not binding upon the States. Now, since the Weeks case, that problem has arisen in 47 of the 48 States of this nation. The federal rule remains the same that it was declared to be in the Weeks case. If this case were across the street in the Federal Building, the answer would be simple, specific, and direct: the evidence would not be admissible. Of the 47 States that have passed on the question, 17 of them have followed the Weeks case and the United States Supreme Court rule that such evidence is not admissible. Thirty of the jurisdictions, however, have taken the view that the fact that the evidence may have been secured in an improper or even illegal way does not prevent its introduction in evidence if it is otherwise relevant to the issues.

Now, I am not discussing or debating the merits one way or the other of those decisions.

The problem has likewise come before ten of the British Commonwealth nations, of the highest courts: England, Canada, Australia, and—I do not know the others. Now, [fol. 242] I recognize that constitutional limitations such as the Fourth Amendment have, of course, no application; but I mention it only because of the common law background and basic interpretations. Those ten countries of the English Commonwealth of Nations have each held that the evidence was admissible.

Now, in California you have mentioned and criticized in your side of the argument the Mayen case which was decided by our own Supreme Court around about 1923, I should say. I may be off a year or so on that.

More recently the Supreme Court, about 1941 or 1942, with *People v. Gonzales*, which is reported in, I think, 20 Cal. 2d—In that case, as I recall, the court stood five to two. One of those dissenting was Mr. Justice Houser, who has since passed on; I think the other was Mr. Justice Carter.

Then, a year or two later, *People v. Kelly* went before

the Supreme Court. I think that is in 22 Cal. 2d, and again, with a slightly different composition of the court, they split again five to two in support of and following the Mayen case that the evidence is admissible if it is material, without regard to the fact that it may have been secured in an improper or even illegal fashion.

Interestingly enough, the dissents in that case were Mr. Justice Carter, again, and Mr. Justice pro tempore Peters who was sitting on the Supreme Court in that case [fol. 243] by assignment and who is the author of the opinion that Mr. Carr referred to in *extensio* of *People v. One 1941 Mercury Sedan*. Mr. Justice Peters, as a pro tempore member of the Supreme Court, voted for the rule or decision which would have excluded the evidence; but as a member of the District Court of Appeal later writing an opinion which is to the other viewpoint, namely, that the evidence is admissible if it is material. Then, by the time the case got around for rehearing, the then vacancy caused by Mr. Justice Houser's death had been filled, so Mr. Justice pro tempore Peters was not sitting on the court, Mr. Justice Shaw had taken the place made vacant by Mr. Justice Houser's passing; and so on a vote for rehearing, there were two votes for rehearing, Mr. Justice Carter, again, and Mr. Justice Shaw. So that the view of the Supreme Court seems to be at about the basis of five to two, one member of the court having gone on since the *People v. Kelly* decision.

But it is interesting to note that Mr. Justice Peters, the author of the opinion in that case that Mr. Carr referred to which, I believe was decided within the last year or so, Mr. Carr—

Mr. Carr: It is a 1946 opinion, your Honor.

The Court: Well, at least two or three years after *People v. Kelly*. He evidently considered himself bound by the decisions in the line of cases such as the Mayen case, the [fol. 244] Gonzales case, and the Kelly case, and writes an opinion in line with those decisions.

Now, those cases are all based upon the unreasonable search and seizure idea. Now, *Wolf v. Colorado*, which you have so frequently referred to, as you did in your very extensive and thorough brief, was decided, as I recall, the

you can really get relief from this problem. If I should decide the case—as you know now, I am deciding it the other way—in favor of the defendant, there is no appeal by the People and no effective way of getting an interpretation of the case with relation to whatever effect, if any, the case of *Wolf v. Colorado* has on it. This will give you a chance to find out whether or not *Wolf v. Colorado* has any bearing upon that issue in the eyes of the reviewing courts of this State.

I think you three lawyers know me well enough at least, to know that I am not at all even slightly sensitive about an appeal. I would welcome your pursuing the matter for the purpose of determining whether or not there is any difference of view of the courts, either because of the *Wolf* case, or otherwise, on either of these two propositions. [fol. 248]

But the net result of the decisions of this State—and in one respect, particularly, I am not able to agree with you, Mr. Ring; I conceive the responsibility of a trial judge to be that he must follow the law in principle as stated by the reviewing courts, that he is bound by it just the same as he is by the Constitution of the State and the interpretation of the Constitution by the higher courts of this State; whether he personally would decide the matter that way or not.

Now, I am conscious, completely so, of the learned associate on this bench that wrote in extenso, may I say, in connection with a labor case—I was thinking it involved Buick automobiles; the dealers in this State—a decision written by Mr. Justice Edwards, I remember, that he found fault with.

As I view the decisions as they now stand, and after a lot of careful thought and I think you will realize some fairly careful consideration of the matter, it is the Court's view that the evidence is admissible, and the motion to strike is denied and several offers of evidence that were made on behalf of the People are received in evidence.

Mr. Marcus: Your Honor, before the Court receives all of them—

The Court: Yes.

[fol. 249] Mr. Marcus: —I think that they ought to be introduced separately.

The Court: Well, you have an objection to each one of them you want, do you not?

Mr. Marcus: Yes, your Honor. May I point out to the Court that it has been so long since the case was tried, that it may refresh the Court's memory.

The Court: Well, there are very slight quantities in some of those capsules.

Mr. Marcus: There is slight evidence with respect to the slight quantity being present.

The Court: Well, let me take a look at them now.

Mr. Marcus: I would like, if possible—may I approach the bench?

The Court: Yes; surely.

Mr. Marcus: —to have a clearcut issue on this.

The Court: Well, I thought about that, too. I am not at all certain but what there is some point to that.

Mr. Marcus: If we are going to have a clearcut issue on the question, and I believe counsel and I have determined to take it up, if your Honor remembers the last testimony of the officer, the examining officer, the chemist, it was that he could not tell that these were the capsules that he examined.

The Court: That is, these two here, is it not?

Mr. Marcus: It is those little capsules.

[fol. 250] The Court: I remember them, and they are very minute, as I recall it; that is, these that I have here in my hand, I think.

Mr. Marcus: That is right, your Honor. Now, if your Honor would exclude those and the spoon and the eye dropper there—

The Court: I do not think the spoon and eye dropper necessarily come in the same classification as these two capsules.

Mr. Marcus: The two capsules that were wrapped in that cellophane there are the ones that they claim were extracted from his stomach.

The Court: Are those the ones? Where are the others?

Mr. Carr: Then there were some other capsules that were empty but had a faint discoloration.

The Court: Yes, a trace, so to speak. Right here is one (indicating).

Mr. Marcus: Besides, those they claim were found

about the premises, they were not found upon the person of the defendant; so they would have no bearing on it.

The Court: Now, I will tell you what I am inclined to do here, gentlemen. The amount or quantity that was in these others there was virtually negative, I believe. Now, if you will get me separated, I think your tools or implements here are on a little different basis, Mr. Marcus; but I do not think that would prevent your issue from being [fol. 251] precisely presented; but I am inclined to exclude, because the weight to be given to them is slight, if any, the other capsules there, so as to get this down to the real question that has been the source of a lot of argument here. I do not want a conviction sustained, and not get the real issue involved here settled, on a minimum of evidence.

Now, Mr. Clerk, have you got the notation of the exhibits there, what they are? I will make a ruling on them.

Mr. Marcus: Here they are, your Honor. Those are the two purported capsules that were taken from the stomach.

The Court: They are admitted in evidence, the capsules and the contents that were taken from the stomach; they are admitted in evidence now, whatever their number is.

I think I should admit, too—it would be all right to get a ruling on that, too—the tools, I will call them, that were taken into custody or possession in the place.

I will exclude from evidence the virtually empty capsules that were discovered there. I think I have got them poured out on my bench now. I see three or four that it would take almost a magnifying glass to get at.

Now, if you will tell me what those numbers are, that is what I am going to do on that, I think.

Mr. Marcus: I would like to be heard on the eye dropper for just one minute further, your Honor.

There was no evidence whatsoever that that eye dropper had any narcotics in it. He made the statement that it was [fol. 252] used—or could be used by an addict. On the spoon, he said that after scraping it and subjecting it to some sort of a test, which test he destroyed afterwards by dumping it down the sink, he determined there was some trace or semblance of narcotics in it.

The Court: I think that was with respect to these little open capsules that I have in my hand.

Mr. Marcus: Well, with respect to those too he stated

to the same effect, that he made a test upon those, and I believe he got enough from all of them to put them into a drop of water, and then it evaporated and he washed out the vessel and that was the end of it.

The Court: People's Exhibit No. 1 is the two capsules. I think that is clear.

Mr. Marcus: That is right.

The Court: People's Exhibit No. 2 consists of the spoon and dropper. That is my understanding of it. Is that yours? Mr. Carr, have you anything to say?

Mr. Marcus: Yes, your Honor, that is correct; the spoon and the dropper are Exhibit No. 2.

Mr. Carr: Wait a minute. I am trying to run down this index. Exhibit No. 2 was those empty capsules. No. 1 was those which were received from the defendant's stomach—now, wait a minute.

The Court: We had a different clerk then, otherwise maybe I could find my own notes.

[fol. 253] Mr. Carr: You know, your Honor, I don't think that we numbered either the eye dropper or the spoon, insofar as the record is concerned, the proceedings which were had on the 13th and 15th of September. It only refers to two exhibit numbers, which are, 1, the substance extracted from the defendant's stomach, and, 2, those empty capsules. I don't recall, or the record doesn't reveal, any number being given to the eye dropper or the spoon.

Now, if I may look at them—I make a practice, when I ask for them to be marked for identification, to write on them in my own inimitable manner someplace.

The Court: Here are these four capsules. I am just putting them back in the box.

Here are the two out of the stomach; that is Exhibit No. 1.

Off the record.

(Discussion off the record.)

The Court: All right, Mr. Carr.

Mr. Carr: I recall now, if your Honor please, that the spoon and the eye dropper, and there is a little package, a little brown bag containing some milk sugar, and a box containing some empty capsules, were all Exhibit No. 2. I recall it now, all of those substances were Exhibit No. 2.

Exhibit No. 1 consisted of the substance extracted from the defendant's stomach.

The Court: I think that is right.

[fol. 254] Mr. Marcus: That is correct. I believe this entire No. 2 should be excluded, and is going to be—

The Court: Well, I am inclined to break Exhibit No. 2 up now and let Exhibit No. 2 be merely the tools, and nothing else; exclude the rest of it. I would like to find out what they think about the presence of these tools. It might be helpful in other cases, too. It is not going to hurt your case any, I mean the main issue.

The Exhibit No. 2 is—what was formerly Exhibit No. 2—is now broken up, so to speak, and consists only of the spoon and the eye dropper—I guess that is what you call it, is it not?

Mr. Marcus: That is right, an eye dropper.

Mr. Carr: It is an eye dropper.

The Court: —which are attached together here; and the rest of the contents of that exhibit which was originally offered as Exhibit No. 2, an objection is sustained as to that.

Mr. Marcus: Then may it be understood, your Honor, that the spoon is admitted not for the purpose of establishing the fact that there may have been some scrapings in there, but only for the purpose of a tool used as the officer testified—

The Court: I am not answering—

Mr. Carr: No, I am not going to understand that, please. I think that Exhibit No. 2 ought to go in as a tool, and [fol. 255] as further evidencing the fact that it was a tool, the fact that there were some evidences of narcotic found in the bowl of the spoon. Likewise, there was some evidence of the narcotic found in the eye dropper.

The Court: I will let the evidence stand with relation to the tool; but, in other words, if the man is to be convicted and a conviction sustained, it will either be sustained essentially upon People's Exhibit No. 1, I think; but that might be used as some corroboration if the other is admissible. No. Exhibit No. 2 now consists of the eye dropper and the spoon.

Now, let's take a brief recess.

(Short recess taken.)

6
The Court: ~~The record~~ may show the defendant personally present and with his counsel.

Now, let's see, where are we now?

Mr. Carr: The exhibits have been introduced and admitted in evidence, as I understand it.

The Court: Yes.

Mr. Carr: Exhibits Nos. 1 and 2.

The People rest.

The Court: All right. Now, your defense?

Mr. Marcus: Well, we are rather like the bull who has either horn of a dilemma here.

I am wondering, your Honor, whether or not at this time, in view of the Court's statement, we might introduce [fol. 256] evidence at this time with respect to the facts and circumstances surrounding the alleged commission of this offense.

The Court: You mean—

Mr. Marcus: I don't want to impose upon the Court.

The Court: Well, I am prepared to listen to any evidence you have here and consider it when it is in. My thought was this: That evidence would be sufficient, undenied, to sustain a conviction; and if you stop now, that is probably what you would get. However, if you want to put your client on, which I rather assumed you would—but you can do whatever you think you ought to do.

Mr. Marcus: Well, suppose counsel is willing to stipulate that if the defendant were called as a witness he would testify that this Exhibit No. 1 was forcibly taken from him by the use of a stomach pump without his permission or consent and against his will, wishes, or desires.

Mr. Carr: We will so stipulate, without going into the veracity. In other words, he would so testify, leaving the determination of the veracity, weight and credibility to the Court. All right, with that understanding, we so stipulate.

Mr. Marcus: So stipulated, your Honor.

Now, I have one more witness that I will call for a few questions unless counsel is willing to stipulate that Mrs. Margarita Hernandez, if she were called as a witness, [fol. 257] she would testify that three officers beset him in the house—

The Court: I missed a word. Three officers—

Mr. Marcus: Beset him.

The Court: Thank you.

Mr. Marcus: —at his home and choked him—

Mr. Carr: Now, wait a minute. We can't stipulate to that.

Mr. Marcus: That is in the record, the officers even testified to that. They used the word "choked."

Mr. Carr: They tried to get the exhibit out.

Mr. Marcus: Well, what they tried to do, I know, but what they actually did and what they actually testified to, was they choked him.

The Court: Why don't you put her on the stand?

Mr. Carr: Let her tell her story.

The Court: If you are going to have any difficulty with that, and I can see why the prosecutor might not want to stipulate to that, because it might be misunderstood. Now, I remember the testimony.

[fol. 258]

DEFENSE

Mr. Marcus: Take the stand, Mrs. Hernandez.

MARGARITA HERNANDEZ, called as a witness by and on behalf of the defendant, being first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Margarita Hernandez.

Direct examination.

By Mr. Marcus:

Q. Mrs. Hernandez, were you at the home of Mr. Róchin on the 1st day of July of this year?

A. Yes.

Q. Were you there at his home?

A. Yes.

Q. Did you see anybody come up to the house?

A. Yes—I didn't see them come up, but I saw them when they came in the room.

Q. Now, what happened when you were in there?

A. Well, I was sound asleep, and I heard something

like—oh, a great big noise, you know, first I heard one, and then I got up—I woke up and I heard another one. That is when they broke the door to our room, kicked the door in and they broke it. Then I saw three policemen walked in, him (indicating) and the other two.

Q. How many police officers came into the room?

A. Three.

[fol. 259] Q. What did they do immediately upon their entry?

A. Well, they just—they said—they started talking to Tony. He was sitting on the bed, and they told him, "Hello, Tony," or, "What have you been doing?" or something like that. I am not sure.

Q. What did they do?

A. Well, they were talking to him, and then I was—you know, I was in bed, I was undressed—had my nightgown on, and I was trying to cover myself and I wasn't paying attention to them. All of a sudden all four of them fell on me. I was sitting up in bed and then all four of them were on top of Tony and he was on top of me and they were choking him.

Q. Who was choking Tony?

A. Him (indicating) and the other two policemen.

Q. You identified Mr. Jones?

A. Jones.

Q. And who else?

A. And Smith, and I don't know the other one, the fat one, blond.

Q. But there were three officers there on top of Tony?

A. Yes.

Q. What were they doing?

A. They were all choking him, and then I started screaming, you know, to leave him alone. Then they all [fol. 260] started looking on the floor for something.

Q. Tell me what you mean by "choking him." Did they have their hands on his throat?

A. They sure did. They all had their hands and they were really choking him. He had the marks on for a long time afterwards.

Q. He had marks on his throat afterwards?

A. Yes.

Q. How long did they choke him?

A. Well, I don't know exactly, but they were the- for about—well, I can't tell exactly, but they were choking him, and then they kept on telling him—they kept on telling him, "Let it go, let it go," or something; and they all let him go at the same time and they all looked on the floor, and, you know, I didn't know—

Q. Did you hear Tony say at that time, "I don't have it, look under the bed," or words to that effect?

A. Well, I was screaming. I couldn't hear very much, you know; I was screaming. I was telling them to let him go, because they were choking him hard. He couldn't even breathe or nothing; I mean, the way his face was making, it was getting me scared, so I was scared.

Q. What was his face making at the time?

A. All kinds of faces and all kinds of noises.

Q. He was undergoing facial distortion at the time you were screaming?

[fol. 261] A. He couldn't even, you know—like gasping.

Q. He was gasping, you say?

A. I can't explain it, but I was scared—

Q. Was he able to breathe?

A. No.

Q. Was he gasping for breath?

A. Yes.

Q. Then they let him go?

A. They all let him go at once and then they looked on the floor. Then he got up, and he (indicating) is the one; he said, "All right, hurry up and put on your clothes."

Q. You mean Mr. Jones here?

A. Yes.

Q. Said, "Hurry up and put your clothes on"?

A. Yes.

Q. To whom?

A. To Tony.

Q. What was Tony's condition at that time?

A. Well, he didn't have any clothes on. Then they said, "Hurry up and put your clothes on"; so he started—he put on his pants, and then he sat down by the window on a trunk to put on his shoes and socks, and then he was standing there; and then he said—

Q. "He"—you mean Mr. Jones?

A. Mr. Jones (indicating). He was standing there by the closet and he was watching him put on his clothes. I [fol. 262] guess he got impatient because he wasn't doing it fast enough or something, and so he said, "Hurry up," and he called him an s. o. b.; and he was sitting down, and he hit him on his chin for no reason at all. He wasn't doing anything to him. He just got impatient because he wasn't putting his socks on fast enough.

Q. You saw Mr. Jones strike Mr. Rochin?

A. Yes, I did. Yes, I did. He just said, "Hurry up, you s. o. b."; and he was sitting down (indicating).

Q. You are indicating a motion with your fist?

A. Like a Sunday punch.

Q. Did you see the officer strike Rochin at that time?

A. Yes, I did.

Q. Then what happened?

A. Then Tony—I guess he got mad, because he jumped up and then he, you know, put his hand up like that (indicating) to protect himself; and then all of the other cops come in, the other two cops, they jumped in.

Q. What did they do?

A. They all jumped on top of him. They all started holding him, you know.

Q. Did they put any handcuffs on him at that time?

A. He had handcuffs on when he hit him.

Q. Was Mr. Rochin handcuffed at the time that the officer struck him?

A. Yes. He was putting on his socks with his hand-[fol. 263] cuffs, because when he was going to put on his shirt he couldn't slip his arm through the shirt, he just had to put his shirt over him. I don't know if they opened it later, because I remember when he was putting on his shirt he just had to put it over his shoulder like that (indicating), he couldn't put it on.

Q. Then what happened?

A. Then they took him—he (indicating) took, Mr. Jones took Tony to the hospital; and then I was there by myself with the other two officers. They wouldn't let me get up. I told them if they would please go out of the room so I could put on a bathrobe or something; and they said, "No, you better stay where you are." Then they said, "O. K."—

The Court: I guess we have got them separated now. That would not be material.

Mr. Marcus: All right.

By Mr. Marcus:

Q. Then what happened? Tell me, was Tony taken away from there?

A. He was taken away from there, but I wanted to say, because he said that he didn't—he didn't force Tony. Well, when he came back he was all pooped out. He came upstairs, he left Tony downstairs, and the other two cops were up there. He went like that (indicating), "Whew, that young punk, he sure is tough. He gave me so much trouble"—

Q. Does that mean after he came back?

[fol. 264] A. When he brought him back from the hospital.

Q. Yes.

A. And he had a red thing here (indicating), like, you know—

Q. Who had a red thing on his forehead?

A. Mr. Jones. He had a red thing here (indicating).

Q. Indicating on the left side of the cheek?

A. On his temple.

Q. His temple?

A. Right here (indicating); and then when he came up he told the other two cops, "Oh, that kid—that punk sure is tough. He gave me so much trouble," he says, "he really was tough." He told those other two officers. I don't know whether it was the exact wording, but it was something like that, you know.

Q. Words to that effect?

A. Yes.

Q. That is after they returned from the hospital?

A. After they returned, and that is why I know that Tony didn't go willingly.

Mr. Marcus: That may go out.

The Court: Yes, the latter remark goes out.

By Mr. Marcus:

Q. Did you see any cellophane on the dresser in the room there as indicated by Exhibit No. 1 here?

A. Well, I didn't see anything, because I was asleep.

The Court: Well, that answers the question. She says [fol. 265] she did not see anything because she was asleep.

The Witness: I mean, about that, because, see, I was asleep; and then when the officers came in they woke me up.

By Mr. Marcus:

Q. I will ask you whether or not you saw this Exhibit No. 1 in the room there at any time.

A. No, I didn't see that.

Q. Your answer is "No"?

A. No.

Mr. Marcus: All right, that is all.

The Court: Mr. Carr, you may cross-examine.

Cross-examination.

By Mr. Carr:

Q. How long have you known Tony?

A. Oh, it is going to be three years next April.

Q. What is your name, please?

A. My name?

Q. Yes.

A. Margaret Hernandez—Margarita.

Q. Margarita?

A. Yes.

Q. Is that Mrs. Hernandez?

A. Yes.

Q. Are you related to the defendant?

A. I am his common-law wife.

Q. I see. How long have you and the defendant been in that relationship?

[fol. 266] A. Well, for—well, we have been together, it is going to be three years in April.

Q. Has that all been here in Los Angeles?

A. Yes.

Q. Now, were you living at that room at the time?

A. Yes.

Q. Did you know Mr. Jones before that time?

A. No, I had never seen him before.

Q. Did you know either of the two officers before that time?

A. No, sir.

Q. Now, when you went to bed you saw some capsules there on the dresser, didn't you?

A. No, I didn't.

Q. You know what a capsule is, don't you?

A. Yes. I saw the capsules.

Q. I beg your pardon?

A. I have seen capsules.

Q. You have seen capsules with a brownish substance in them?

A. Brown?

Q. Yes.

A. Well, I have seen all colors; red, green, yellow, white; every color.

Q. Now, you saw the spoon that was introduced here in evidence?

[fol. 267] A. No, I didn't see it.

Q. Didn't you see the spoon?

A. Well, from up there, you know.

Q. Did you also see the eye dropper?

A. Yes.

Q. Did you see those, that spoon or a spoon like it, in there in the apartment?

A. Where? In my house?

Q. Yes, where the two of you were living.

A. Well, that eye dropper had been in my drawer where I have all kinds of—you know, like medicines and Band-aids and strings and things like that. That had been in there for so long I didn't even remember it was in there.

Q. Was it yours, that spoon?

A. I am not talking about the spoon.

Q. I mean the eye dropper. Was it yours?

A. No, it wasn't mine; it was Tony's.

Q. Now, how about the spoon? Do you recall ever seeing that spoon around there?

A. I didn't even see them when they got it, the officers; I didn't even see it.

Q. Now, you say you were awakened by this pounding on the door and then the officers coming in?

A. Yes, sir.

Q. When you awakened, Tony was there by the bed, was he not?

[fol. 268] A. Yes.

Q. You have a little dresser or a stand there by the bed?

A. A little table.

Q. You saw Tony pick something up off the table and put it in his mouth?

A. No, I didn't see him pick up nothing. I tell you, I was trying to cover myself up. They were talking to him, and, I don't know, I didn't even notice. I was just there. I was trying to cover myself up, and I was so nervous, I was shaking and everything, and then all of a sudden, just like that, they all fell on me.

Q. Well, while the officers had hold of Tony's throat, they were telling him to spit it out, weren't they? Did you hear them say that, "Spit it out"?

A. I didn't hear anything because I was yelling.

Q. Oh, you were yelling?

A. Yes.

Q. You were yelling so loud you couldn't hear?

A. Well, I can't hear if I was yelling. I was looking at them and I was trying to pull their hair and everything. I was trying to get them off.

Q. Well, while you were yelling did you hear them say something to Tony about "Spit it out"?

A. I heard them cussing. They were cussing at him. They were saying—they were saying, "Let it go"—I don't [fol. 269] remember.

Q. "Let it go"?

A. "Let it go," or something. I can't remember exactly.

Q. "Spit it out"?

A. No, I didn't hear them say that. I can't say because I don't remember.

Q. Or, "Give it to me," something like that, or, "Let it go"?

A. I don't know. I don't remember.

Q. All right. Then they let go of him and they all started looking around on the floor, is that right?

A. Yes.

Q. Then they didn't pick up anything off the floor, did they?

A. I don't know. I was in bed. I couldn't see.

Q. All right. Then they had Tony get dressed and they took him out of there, is that right?

A. But he hit him before he took him out.

Q. All right. Then, when they came back, you say he was pooped. Who was pooped, Tony?

A. No, Mr. Jones. He was tired.

Q. How about Tony, was he pooped?

A. I didn't see him. They kept him downstairs in the kitchen while they searched the rooms upstairs.

Q. I see. Now, did you put any heroin in that room?
[fol. 270] A. No, sir.

Q. Was any heroin of yours in that room at all?

A. No, sir.

Q. That eye dropper wasn't yours?

A. No, it was in his—when I move to the house he had his things in his mother's room, or his mother had his things; you know, his clothes and his letters and all that; so I took them all out of that box and put them in our dresser, and it just happened to be there all that time.

Q. That spoon, that was not yours either, was it?

A. No.

Mr. Carr: That is all.

Redirect examination.

By Mr. Marcus:

Q. You live there at Tony's home?

A. Yes, sir.

Q. Tony lives there with his mother and his sisters and the rest of his family, is that right?

A. Yes.

Q. It is not a hotel?

A. No.

Q. Or boarding house of any kind; it is a private home, is it?

A. Yes.

Q. The room that Tony occupies was on the second floor?

[fol. 271] A. Yes.

Q. The family occupies the rest of the house, is that correct?

A. Yes.

Q. His mother is here in the courtroom now?

A. Yes.

Mr. Marcus: That is all.

Mr. Carr: There is one question I should have asked before.

The Court: All right.

Recross-examination.

By Mr. Carr:

Q. You are prejudiced against narcotic officers, aren't you?

Mr. Marcus: I object to that as being immaterial.

The Witness: I am not prejudiced against anyone.

The Court: I will let her answer.

Mr. Carr: All right. The answer is in. That is all.

Mr. Marcus: Step down.

(Witness excused.)

Mr. Marcus: Mrs. Rochin, will you come forward?

LUCY ROCHIN, called as a witness by and on behalf of the defendant, being first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Lucy Rochin.

[fol. 272] Direct examination.

By Mr. Marcus:

Q. Can you speak a little English, Mrs. Rochin?

A. Yes, a little bit; not much.

Q. All right. I won't ask very much; I will ask a little bit.

Mrs. Rochin, you live in this house with Tony?

A. Yes, sir.

Q. Do you remember three officers coming to your house?

A. Yes, sir.

Q. How did they get in?

A. I was in the yard, and I saw the man—

Q. Louder; the judge has to hear you.

A. I was in my yard, and I saw three mens; and they opened the door and go up, went up, and I follow. When I saw opened the door—

Q. How did they open the door?

A. The mens.

Q. How?

A. No, the door was opened with the hand, but up, they hit it.

Q. They broke it?

A. Yes.

Q. With what?

A. With the kick.

[fol. 273] Q. With the foot, kicking?

A. Yes.

Q. You saw them do that?

A. Yes, I saw—you know; como se dice?

Q. Noise?

A. Noise.

Q. You heard noise?

A. Yes. I was scared, and I just stand on the stairs. When open the doors, I heard Margarita talk loud, and it was crying—

Q. Margarita was talking loud and crying?

A. Yes. It was because the mans hit Tony.

Q. What did you do then?

A. I'm scary, and I call my boy, but my boy was on the stairs back of me. He followed me.

Q. Now, did you see the officers hit Tony?

A. Yes; that boy. (indicating), that man.

Q. The officer there, Mr. Jones?

A. Yes.

Q. What did they do to Tony? If you have a little trouble with the English, tell me and I will translate a word for you.

A. You know, Tony was—wanted to wear the shoes; and he say, "Get up. Pronto. Pronto."

Q. Hurry, hurry?

A. Hurry, hurry; and he hit Tony, you know, like [fol. 274] this (indicating).

Q. He hit Tony in the jaw?

A. Yes.

Q. Then what happened?

A. And then I go back down and I don't hear no more, because I am scared, so I go down.

Q. But you did see the officer hit Tony?

A. Yes.

Mr. Marcus: All right, that is all.

Mr. Carr: No questions.

Mr. Marcus: Step down.

(Witness excused.)

Mr. Marcus: Take the stand, Mr. Rochin.

Just one question from this witness, the defendant.

ANTONIO RICHARD ROCHIN, the defendant herein, called as a witness in his own behalf, being first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Antonio Richard Rochin.

Mr. Marcus: I am going to excuse the witness. Step down.

(Witness excused.)

Mr. Marcus: The defendant rests.

The Court: Any rebuttal?

Mr. Carr: No rebuttal. Waive opening.

The Court: By the way, before you close the evidence, [fol. 275] I think there is one more observation I should make in clarification of the record or something.

Since I have excluded from the evidence as an exhibit those capsules that were to all practical purposes empty, I think that the evidence with respect to the alleged contents of those capsules that I have excluded from evidence should be stricken, to make this record consistent.

Mr. Marcus: Yes.

Mr. Carr: Yes.

The Court: So the Court strikes out the evidence as to the contents of the capsules which the Court has excluded from evidence.

I think that makes your issue a little clearer and a little more precise.

Mr. Carr: I will waive opening.

Mr. Marcus: At this time the defendant moves to strike from the record all the evidence introduced on behalf of the People during the course of these proceedings, upon the same grounds and for the same reasons heretofore advanced to the Court.

Mr. Carr: The People resist the motion.

The Court: The motion is denied.

Mr. Marcus: Now, at this time, your Honor, we move to strike from the evidence Exhibit No. 1, that is, the evidence that was purportedly taken from the defendant's stomach by means of force used upon him in the performance of the stomach-pumping operation against his [fol. 276] wishes and desires, and against his will and consent.

Mr. Carr: We resist the motion.

The Court: The motion is denied.

Mr. Marcus: The defendant rests.

Mr. Carr: The matter is submitted.

Mr. Marcus: Submitted, your Honor.

The Court: The Court finds the defendant guilty as charged.

Now, do you want to make a motion for a new trial so that you will have that as a ground for appeal, a sure and easy way of raising your question, and do you want to file an application for probation and set that for argument at the same time? Then I know you will have every issue squarely preserved, regardless of what I do on probation.

Mr. Marcus: Well, your Honor, we are going to take it up regardless of what your Honor does, on probation, although I don't think it would be proper, I don't think it would be expeditious to refer it to the Probation Department.

I would suggest this, that we make the motion, and upon behalf of the defendant I do now make the motion upon all statutory grounds.

The Court: All right.

Mr. Marcus: If at a later date the Supreme Court or the District Court of Appeal, or the Supreme Court of the United States should determine that he is not guilty, the [fol. 277] effort on behalf of the defendant by the Probation Department would be nil, and we can always make the application for probation afterward.

The Court: All right. Now, the next step, then, you make the motion for a new trial upon all statutory grounds. Let's set that for hearing. Is there some limitation on time for that?

Mr. Marcus: Yes, your Honor, there is.

Mr. Carr: Twenty days. However, there is 20 and 20, that is 40, but where there is an application for probation, then the time is limitless.

The Court: There is no application here.

Mr. Carr: Aren't you going to make an application for probation now?

Mr. Marcus: I didn't want to make one now because we are going up anyway. You can always make it at a later time.

Mr. Carr: Well, what have you done now? You have made a motion for a new trial?

The Court: Yes.

Mr. Marcus: Yes.

Mr. Carr: All right. That ought to come up for hearing in—I think it is within 20 days.

Mr. Marcus: We will make the application for probation, but not file it. That will give your Honor whatever time your Honor desires to hear any argument or motion [fol. 278] for a new trial.

The Court: Well, how about sometime the 9th or 10th? I know that would be in order, and if not the 9th or 10th of November, how about the 14th, if that is within time?

Mr. Marcus: Any date that your Honor sets is all right with me, the 10th or 14th, somewhere in there.

Mr. Carr: It is 30 days. You have 20 days to pass sentence within, and then there can be an additional 10 days for the hearing and determination of the motion for a new trial or arrest of judgment.

The Court: Let's set it for the 10th, then.

Mr. Marcus: Where there is a motion for probation pending, the time is extended for 60 days?

Mr. Carr: Well, it is indefinite to hear that.

The Court: Let's make it the 10th of November, because this case has been running along quite a long time.

Mr. Marcus: That is right.

The Court: It is nobody's fault. I do not mean to be critical in any degree.

Let's set the motion for a new trial on Thursday, the 10th, and that will give nearly two weeks.

The defendant is on bail, is he not?

Mr. Marcus: Yes, he is, your Honor.

The Court: The defendant may remain on the current bail, to be back here on the 10th of November. You have been coming back a lot of times, and I think he ought to be [fol. 279] allowed to remain on bail.

(Whereupon, at 4:50 p. m., Friday, October 28, 1949, an adjournment was taken until Thursday, November 10, 1949, at 10:15 a. m.)

[fol. 280]

Los Angeles, California,

Thursday, November 10, 1949. 10:15 A. M.

The Court: People vs. Rochin.

Today was the time for judgment and sentence, was it not?

Mr. Marcus: And the motion for a new trial, your Honor.

The Court: And the motion for a new trial, too.

Mr. Marcus: That is right.

The Court: You made your motion upon all the grounds that the statute provides and you wanted to base your argument--include in your argument all the argument that was made upon the previous extensive argument and briefs that were filed, I take it?

Mr. Marcus: That is correct, your Honor.

The Court: Now, do you want to add anything additional?

Mr. Marcus: I do not believe, your Honor, that there is anything to be added to the argument that has already been presented by myself and Mr. Ring with reference to our motion to dismiss, our motion to exclude the evidence.

The Court: I think you have covered it very fully, but I did not want to deny you the opportunity to add anything that might have in the meantime occurred to you.

There is not anything additional, then?

Mr. Marcus: There is nothing at this time that I care to argue.

[fol. 281] The Court: All right. The motion for a new trial is denied.

Now, that brings us to the point of judgment and sentence. Now, the motion for a new trial denial gives you a basis for appeal in and of itself, does it not?

Mr. Marcus: I do not believe—Will the reporter repeat the Court's remarks?

The Court: I say, the denial of a motion for a new trial gives you a right of appeal from that order in and of itself, does it not?

Mr. Marcus: No, your Honor, I do not believe so.

Mr. Carr: That is right, Judge; you can appeal from a judgment and sentence or an order denying a motion for a new trial.

Mr. Marcus: Are you sure of that?

Mr. Carr: Yes.

The Court: That is one of the reasons for making the motion for a new trial, is to make sure that you have got the right of appeal even though probation might be granted.

Mr. Marcus: Let me check it again, your Honor.

The Court: Oh, certainly. I could be wrong on that, as I sometimes am on other things.

What I was getting at, Mr. Marcus, is this: If your right of appeal—if you are satisfied and I am satisfied, but I want you satisfied, also—is protected, my thought was that——

[fol. 282] Mr. Marcus: Take the appeal now?

The Court: You could now make an application for probation and that would not interfere in any degree with your right to appeal; but, if on the other hand you did not have a right to appeal, then I would have to pronounce some kind of a judgment and not just probation. I do not know what I am going to do with the case, but I am hopeful that you gentlemen, as previously indicated, will take the case up. I have made a record for you, with your cooperation, which is clear and specific and can definitely raise the constitutional questions that have been so vigorously and ably and copiously argued here.

Have you checked that?

Mr. Marcus: Yes, your Honor. I am satisfied that the notice of appeal will lie from a denial.

The Court: That you can appeal from an order denying a motion for a new trial; so that then you would be in a position, if you want to—I am just merely suggesting your

procedural situation, I am not trying to tell you what to do, and please do not misunderstand me—you are in a position, if you want to, to ask to file an application for probation.

Mr. Marcus: Permission has already been requested of this Court, and it is now pending before the Court.

The Court: That, I believe, is correct, and I had momentarily forgotten that. However, at that time the suggestion [fol. 283] was more or less principally from the standpoint of staying time and avoiding any difficulties with relation to time.

Now, I finally one of these days, have got to dispose of this case so far as whatever is to be done. Wouldn't you like to go ahead and actually finish the filing and let it come up and set a date for it?

Mr. Marcus: Well, the matter of sentence could be continued, your Honor, but I would suggest this: At this time it is our desire to file, and we give notice of appeal to the District Court of Appeal of the State of California. We will supplement that by written notice of appeal.

Mr. Carr: Wait a minute. You are taking jurisdiction away from this court for sentence?

The Court: You are spoiling a situation that—

Mr. Carr: You have got to wait until this court finishes all of its acts before you can appeal.

Mr. Marcus: I thought that the matter could go off calendar with respect to the actual imposition and sentence until a decision has been received by the District Court of Appeal.

Mr. Carr: No.

Mr. Marcus: The court always retains jurisdiction until the defendant has been incarcerated under the judgment pronounced.

Mr. Carr: But there has been no judgment pronounced. [fol. 284] Mr. Marcus: It doesn't have to be. We will take the appeal directly.

The Court: I am inclined to think we ought to dispose of the case by either a sentence or probation, and I might grant you, if I sentenced your client, I might very well grant you a stay of execution until your appeal can be determined. In other words, in light of what the problem

is, because I have no desire to take any technical advantage, and I think you fully understand that—

Mr. Marcus: I understand that.

The Court: But, I think procedurally we have got to do one of two things: we have got to go ahead and dispose of it either by judgment and sentence or by a probation hearing and whatever follows from that; and then you are in a position to go on up. If I should decide to give him any sentence by way of time in jail, I would be disposed to grant a stay of execution on that until the appeal could be heard, if it was prosecuted with reasonable diligence, which I assume it will be.

Mr. Marcus: It will be, your Honor. Could we approach the bench for just one moment, your Honor?

The Court: Yes.

(Discussion off the record.)

The Court: Well, in order to get things in order, you think you need a little more time, do you, Mr. Marcus? How is 2:00 o'clock?

[fol. 285] Mr. Marcus: 2:00 o'clock this afternoon?

The Court: Yes. 2:00 o'clock this afternoon.

You will be here, will you not, Mr. Carr?

Mr. Carr: Yes, I will come over, Judge?

(Whereupon, at 10:25 a. m., the above-entitled matter was continued to 3:35 p. m. of the same day.)

[fol. 286]

Los Angeles, California,

Thursday, November 10, 1949. 3:35 P. M.

The Court: People vs. Rocha.

Mr. Myers, don't you want to sit over here at the other end of the table just to keep the thing balanced in the absence of Mr. Carr?

Mr. Myers: Yes, your Honor.

The Court: The record may show that the defendant is personally present in court with his counsel.

This is the time to which the matter had been continued for the purpose of passing judgment and sentence, I believe, Mr. Marcus. Is that right?

Mr. Marcus: That is correct, your Honor.

The Court: Now, do you desire to withdraw your appli-

cation or request to file an application for probation, or what?

Mr. Marcus: We do at this time, your Honor.

The Court: Mr. Rochin, is the statement of your counsel your understanding of things, you do not want to file an application for probation and do not want probation? Is that right?

The Defendant: Yes, sir.

The Court: Well, I think that is a privilege which a defendant has. If he does not want it, he is entitled to not have it.

Is there any further legal cause why judgment should [fol. 287] not now be pronounced, Mr. Marcus?

Mr. Marcus: There is none, your Honor.

The Court: Antonio Richard Rochin, for the offense of which you were convicted by the Court sitting without a jury, a jury having been expressly waived by you, concurred in by your counsel and by the District Attorney, a conviction of violating section 11500 of the Health & Safety Code, it is the judgment of the Court that you be sentenced to the County Jail of Los Angeles County for a period of 60 days.

Mr. Marcus: At this time, your Honor, we serve and file a Notice of Appeal together with a statement of grounds of appeal and request for a clerk's and reporter's transcript.

May the record show that we are now handing the Notice of Appeal to the Clerk.

The Court: All right.

Mr. Marcus: And the request.

Now, at this time may I hand the Court a certificate of probable cause and the request for a stay of execution? May I approach the bench?

The Court: Yes. Please do. I am not sensitive along those lines. After all, we have to do these things according to the physical situation. I appreciate your good manners, however.

Mr. Marcus: So that I may not be presumptive, your Honor, may I suggest a minimum bond on this appeal, because there will be costs and this boy is not well off [fol. 288] financially at the moment.

The Court: Well, the usual bond in these cases is about \$500.00, is it not?

Mr. Marcus: Yes, your Honor.

The Court: That will be satisfactory.

Mr. Marcus: Thank you, your Honor.

The Court: You can sit down there a minute, young man. I have already pronounced judgment, and the time for you to stand was at that time. You may sit down.

The certificate of probable cause is granted and bond is fixed in the sum of \$500.00.

There is a stay of execution of the judgment and sentence which I have just pronounced pending the final determination of this cause on appeal.

Now, I believe with the Notice of Appeal filed and certificate of probable cause having been granted and stay of execution, together with the bond in the sum of \$500.00 on appeal, that that takes care of everything, does it not, Mr. Marcus?

Mr. Marcus: That is it, your Honor.

The Court: All right. Have you got the bond yet?

Mr. Marcus: Yes.

The Court: Do you want me to look at it and approve it?

Mr. Marcus: If your Honor will, please.

The Court: Pass it up, please. In other words, I might [fol. 289] as well take care of everything now and save you running around elsewhere.

Mr. Marcus: Yes.

The Court: This bond is issued by the United States Fidelity and Guaranty, I believe.

All right, the bond which has just been handed to the Court in the sum of \$500.00 by the United States Fidelity and Guaranty Company of Maryland is approved.

I think that takes care of all the matters, does it not, Mr. Marcus?

Mr. Marcus: It does, your Honor.

The Court: All right. I appreciate the cooperation of you and your worthy amicus curiae friend, and also the District Attorney as well, because it is only in that fashion that we can find the complete answer again to this problem. Thank you.

Mr. Marcus: Thank you, your Honor.

(Whereupon, at 3:40 p. m., Thursday, November 10, 1949, the trial in the above-entitled matter was concluded.)

[fols. 290-292] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 293] We, the attorneys of Record in the case of People of the State of California vs. Antonio Richard Rochin, No. 128,156, hereby stipulate that the foregoing transcript is correct, and that the same may be settled and allowed by the Presiding Judge.

W. E. Simpson, District Attorney of Los Angeles County, State of California, By Joseph Blair, Deputy, David C. Marcus, Attorney for Defendant.

Q

I, W. Turney Fox, being the Presiding Judge of the Superior Court of the State of California, and for the County of Los Angeles, in the above-entitled cause, in accordance with the foregoing stipulation do approve the foregoing transcript this 27th day of Feb., 1950.

W. Turney Fox, Presiding Judge.

[fol. 294] Services omitted in printing.

[fol. 295] IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION THREE.

Crim. No. 4452

[File endorsement omitted.]

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,

vs.

ANTONIO RICHARD ROCHIN, Defendant and Appellant.

OPINION—Filed December 12, 1950

Appeal from a judgment of the Superior Court of Los Angeles County, and from orders. W. Turney Fox, Judge. Judgment and order denying motion for new trial af-

firmed. Purported appeal from all other orders dismissed.

For Appellant: David C. Marcus.

William C. Ring as Amicus Curiae, on behalf of Appellant.

For Respondent: Fred N. Howser, Attorney General, Howard S. Goldin, Deputy Attorney General.

Defendant was charged with violating section 11500, of the Health and Safety Code in that on July 1, 1949, he unlawfully had in his possession a preparation of morphine. In a trial without a jury he was convicted. He appeals from the judgment, all orders and rulings of the court.

[fol. 296] On July 1, 1949, about 9 a. m., three deputy sheriffs entered defendant's bedroom after having forced the bedroom door open. They were not authorized by search warrant or at all to enter the room. Defendant and a Mrs. Hernández were in the room. Two capsules, which were wrapped in cellophane, were on a small table therein. Jack Jones, one of the deputies, said to the defendant, "Whose stuff is this?" Defendant then grabbed the capsules and put them in his mouth. Jones testified that at that moment the three deputies jumped upon the defendant, grabbed him by the throat, and began to squeeze his throat in an effort to eject the capsules from his mouth; that force was applied to his throat; that defendant "hollered a little bit"; that he (Jones) put his fingers in defendant's mouth; and they put handcuffs on defendant while he was in the room. Jones then took the defendant to the Angelus Emergency Hospital and into the operating room there. A doctor's assistant strapped the handcuffed defendant to the operating table. Dr. Mier, assumed by the officers to be a doctor of medicine, placed an empty pail by the defendant, placed "a tube down the defendant's throat," and released a white chemical solution into the tube and into defendant's stomach. The defendant vomited into the pail, and two capsules in cellophane floated in the pail. Jones took the capsules from the pail and delivered [fol. 297] them to a chemist in the sheriff's office. The chemist testified that he examined the two capsules and shook what powdery substance that appeared to be within them into small amounts of chemical reagents that he was

using to make the test; that the amount he shook out was very small and was not enough to weigh; that the amount was consumed in the analysis; that the substance which he shook out of the capsules was morphine or one of its close derivatives. The two capsules were shown to the chemist while he was a witness. He testified further that they appeared to be empty; there is a very small amount of very fine powdery residue in one of the capsules; there is a stain or residue of some sort in the other capsule; and the brownish powder in the capsules contains morphine.

Jones testified further that defendant said he had obtained these two capsules of heroin from a person on Sixth Street the night before the arrest, and that he had been using heroin for the past six months.

Defendant did not testify, but it was stipulated that if he were a witness he would testify that the two capsules were taken from him by use of a stomach pump and without his consent and against his will.

[fol. 298] Appellant contends that the arrest, search, seizure and examination of defendant violated rights guaranteed to him by Amendments IV and XIV of the Constitution of the United States and by Article I, sections 1, 13, and 19 of the Constitution of California, and that the evidence procured thereby was inadmissible; and that the coercive stomach pumping of defendant to obtain evidence against him compelled him to be a witness against himself in violation of said Amendment XIV and said Article I, section 13. He argues that the decision in *People v. Mayen*, 188 Cal. 237, which was to the effect that illegally obtained evidence is admissible in a criminal trial in this state, should be overruled; and that the federal rule, which is to the effect that such evidence is not admissible, should prevail in the California courts.

The questions herein, regarding the admissibility in California courts of illegally obtained evidence, have been determined adversely to appellant's contentions. (*People v. Gonzales*, 20 Cal. 2d 165, 169; *People v. Kelley*, 22 Cal. 2d 169, 173; *People v. Harmon*, 89 Cal. App. 2d 55, 58; *People v. Garcia*, 97 A. C. A. 793, 795; *People v. One 1941 Mercury Sedan*, 74 Cal. App. 2d 199, 202, 203; see *People v. Raffington*, 98 A. C. A. 657, 659.) In *People v. Gonzales*, *supra*, it [fol. 299] was said at page 169: "... the accepted rule in this state, as in many others, permits the introduction of

improperly obtained evidence on the ground that the illegality of the search and seizure does not affect the admissibility of the evidence." In *People v. Kelley, supra*, it was said at page 173: "It was concluded [in the Gonzales case] that the use of evidence obtained through an illegal search and seizure does not violate due process of law because it does not affect the fairness or impartiality of the trial. The fact that an officer acted improperly in securing evidence presented against a defendant does not prevent the court from rendering a fair and impartial judgment." In *People v. One 1941 Mercury Sedan, supra*, wherein marijuana was pumped from the stomach of an occupant of the automobile, it was said at pages 202 and 203: "Whatever our views may be as to the propriety of officers of the law using illegal means to enforce the law, the rule is now settled in this state, contrary to the rule prevailing in the federal courts and in some states, that where competent evidence is produced on the trial the courts will not permit an inquiry into its source or the means by which it was obtained. In other words, illegally obtained evidence is admissible on a criminal charge in this state." The contentions of appellant are not sustainable.

[fol. 300] Although the statements made hereinabove are sufficient for the decision herein, it should be stated that the rules of evidence which we are following must not be regarded by police officers and others as a license to indulge in lawless acts. This court does not approve the conduct of deputy sheriff Jack Jones and deputies Smith and Shelton who were with him at defendant's home. Under the record here, they were guilty of unlawfully breaking into and entering defendant's room and were guilty of unlawfully assaulting and battering defendant while in the room. Under the record here, deputy Jack Jones and the alleged doctor of medicine, Mier, were guilty of unlawfully assaulting, battering, torturing and falsely imprisoning the defendant at the alleged hospital. A remedy of defendant for such highhanded and reprehensible conduct is an action for damages. It would appear that the sheriff should review the qualifications of said deputies to be entrusted with the authority of public office. Also it would appear that the qualifications of said Mier as an ethical doctor of medicine should be reviewed.

The judgment, and the order denying defendant's motion for a new trial, are affirmed. The purported appeal from all other orders and rulings of the court is dismissed.

Wood, J.

Concur, Shinn, P. J.

[fol. 302] I concur in everything said by Mr. Justice Wood. To me, the record in this case reveals a shocking series of violations of constitutional rights. I am in entire agreement with the views expressed by Mr. Justice Carter in his dissent in *People v. Gonzales*, 20 Cal. 2d 165, 174. However, as a member of an intermediate reviewing court, I am bound by the decisions of the Supreme Court which, unfortunately, have been looked upon by law enforcement officers as an encouragement, if not an invitation, to the commission of such lawless acts. For that reason only, I concur in the judgment.

Vallee, J.

[fol. 302-A] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 303] IN THE SUPREME COURT OF THE STATE OF
CALIFORNIA

In Bank

PEOPLE

v.

ROCHIN

ORDER DENYING HEARING—Filed January 11, 1951
Appellant's petition for hearing Denied.

Carter, J., and Schauer, J., voting for a hearing.

Gibson, Chief Justice.

[File endorsement omitted.]

See: 2 dissenting opinions filed.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 304] IN SUPREME COURT OF CALIFORNIA

DISSENTING OPINION FROM ORDER DENYING HEARING—Filed
January 11, 1951

I dissent from the order denying a hearing in this case, and because of the flagrant violation of the fundamental constitutional right of privacy depicted in the opinion of the District Court of Appeal, I cannot refrain from giving expression to the strong feeling which I have against the holding of this court (*People v. Mayen*, 188 Cal. 237; *People v. Gonzales*, 20 Cal. 2d 165; *People v. Kelley*, 22 Cal. 2d 169) which gives aid and comfort to so-called officers of the law who are so lacking in respect for the constitutional provisions here involved that they ruthlessly violate them with impunity. I commend the justices of the District Court of Appeal for their forthright declarations in this case against the abuses which are permitted and sanctioned by the holding of this court in the cases cited above, and I have little doubt that, if the justices of the District Court of Appeal who participated in the decision of this case were members of this court, such holding would be promptly and unmistakably changed, and the above cited decisions of this court supporting such holding would be squarely overruled.

In view of the disinclination of the members of this court to change this obviously erroneous rule—established by its own decisions, and in direct conflict with the decisions [File endorsement omitted.]

[fol. 305] of the Supreme Court of the United States and the highest court of many of the other states in the union—(see dissenting opinion in *People v. Gonzales*, supra, 20 Cal. 2d 165, 176) I am asking the Legislature of California to enact legislation which will force the courts of this state to uphold the constitutional provisions (4th Amendment to the Constitution of the United States, Section 19 of Article I of the Constitution of California) guaranteeing the right of privacy to residents of this state.

We are told by our national leaders that a state of emergency now exists throughout the world—that our liberties are in jeopardy—that to preserve those liberties we must unite with other free nations of the world in establishing the most potent military force of all time to resist totalitarian aggression. What are these liberties which

are threatened? Is not the right of privacy, guaranteed by the above mentioned constitutional provisions, one of those liberties? There can be no question that the right of privacy is one of these fundamental rights, guaranteed by the Bill of Rights—the charter of our civil liberties. Could anyone imagine such right being anymore ruthlessly violated under a totalitarian regime than it was in the case at bar? It makes little difference whether the minion of the law who perpetrates such outrages has the official title of commissar, gestapo, sheriff, policeman, constable, game warden, or what-not, the violation of one's right of privacy is just as deplorable. Merely to say that what the officers did in this case, was wrong, is not enough—they will do [fol. 306] it again and again if the courts continue to hold that the evidence they obtain by such unlawful means may be used in criminal prosecutions. The Legislature must therefore declare by statute that evidence obtained in violation of the constitutional provisions here involved shall be inadmissible in any judicial proceeding in order to protect the right of privacy guaranteed by our Constitution so long as this court persists in perpetuating the error it committed in its decision in the *Mayen* case.

The forefathers of this country and the framers of the Constitution of the United States were of the firm conviction that the maxim of Lord Coke was not only true, but that it would be true in the years to come, and that a provision to insure its protection should be placed in the Bill of Rights. Lord Coke said that "The house of everyone is to him as his castle and fortress, as well for his defense against injury and violence as for his repose."

This great right is expressed in the Fourth Amendment to the Constitution of the United States, and it reads as follows: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." This exact provision is found in the Constitution of our State in Section 19, Article I.

[fol. 307] The United States Supreme Court, speaking through many great judges and in a great number of cases,

has staunchly refused to allow this right to be violated. In the highest court of our country, the protection extends even farther than the literal words of the Amendment. No evidence obtained in violation thereof may be used against a defendant in the federal courts. This is the result I desire to achieve by the proposed legislation. Such a statute should provide: "*No evidence obtained in violation of Section 19, Article I of the Constitution or any law of the State of California shall ever be introduced or admitted or used for any purpose whatsoever in any Court of this State.*"

Mr. Justice Holmes, in his great dissent in *Olmstead v. United States*, 277 U. S. 438 (469, 470) had this to say: "But I think, as Mr. Justice Brandeis says, that apart from the Constitution the government ought not to use evidence obtained and only obtainable by a criminal act . . . we must consider the two objects of desire, both of which we cannot have and make up our minds which to choose. It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. If it pays its officers for having got evidence by crime I do not see why it may not as well pay them for getting it in the same way, and I can attach no importance to protestations of disapproval if it knowingly accepts and pays and announces that in future it will pay for the fruits. We have to choose, and [fol. 308] for my part I think it a less evil that some criminals should escape than that the government should play an ignoble part."

The problem to be solved is a serious one. Under the law of this state any police officer may break into any home, seize anything he may desire and this may be used against a defendant despite the fact that no warrant had been issued, and that the breaking and entering may have been done on mere suspicion or conjecture. The constitutional provision was adopted to prevent this very evil. Mr. Justice Douglas, in a recent decision handed down by the Supreme Court of the United States (*McDonald v. United States*, 335 U. S. 451) stated the proposition well when he said: "We are not dealing with formalities. The presence

of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. *We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing [fol. 309] by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.*" The same statement is no less true when it is said of our Constitution. Power is a heady thing whether it is exercised by federal police or by state police; and history does show that the police, no matter whether of our government or of the federal government, when acting on their own cannot be trusted.

The contention is frequently made, in support of the law as it now stands, that the officers found what they expected to find and that therefore the evidence must be admissible. Mr. Justice Jackson in *United States v. Di Re* (332 U. S. 581) answers it in this way: "The Government's last resort in support of the arrest is to reason from the fruits of the search to the conclusion that the officer's knowledge at the time gave them grounds for it. We have had frequent occasion to point out that a search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success."

"We meet in this case, as in many, the appeal to necessity. It is said that if such arrests and searches cannot be made, law enforcement will be more difficult and uncertain. But the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment."

[fol. 310] The right of the people to be secure in their persons, houses, papers and effects must be protected. In the understandable zeal of police officers to ferret out crime and in the excitement of the capture of a suspected person, officers are less likely to possess the detachment and neutrality with which the constitutional rights of the suspect must be viewed. To provide the necessary security against unreasonable intrusions upon the private lives of individuals, the framers of the Fourth Amendment required adherence to judicial processes wherever possible. And subsequent history has confirmed the wisdom of that requirement. This should also be true of our constitutional provision, but it has not been so construed to prevent evidence so obtained from being used against the accused person.

The Elder Pitt, in his speech on the Excise Tax, gave expression to what later became the Fourth Amendment. What he said then is just as important today. He said that "The poorest man may in his cottage bid defiance to all the forces of the crown. It may be frail; its roof may shake; the winds may blow through it; the storms may enter; the rain may enter—but the King of England cannot enter. All his forces cannot cross the threshold of the ruined tenement." Yet the police and other so-called law enforcement officers in California may now ruthlessly force their way into the home of a private citizen, and *without a search warrant*, seize whatever they may find and use it as evidence in our courts notwithstanding they violated the constitutional right—the right of privacy—of the citizen in obtaining it. Cases such as this make it crystal clear [fol. 311] that a rigid application of the federal rule is necessary to prevent this abuse of police power. It has been truly said that: "Power is a bell which prevents those who start it ringing from hearing any other sound."

Every student of history recognizes that the abuse of official power has been the source of the major ills inflicted upon mankind since the existence of organized governments. This is true notwithstanding the effort of those who believe in a democratic form of government to establish a system of checks and balances so that boundless power is not reposed in any single official or branch of government. Hence the provision of both the Fourth Amendment to the

Constitution of the United States and Section 19 of Article I of the Constitution of California, that before a search may be made or evidence seized, proof under oath must be submitted to a magistrate or a judicial official—that probable cause exists for such search or seizure, and a warrant issued by such magistrate “particularly describing the place to be searched and the person or thing to be seized.” Those constitutional mandates were designed to place a curb or restriction upon the power of the law enforcing branch of the government, requiring it to obtain judicial sanction, in cases where a search is necessary to obtain such evidence. It is sheer nonsense to say that those who drafted those constitutional provisions ever had any other thought in mind than that evidence obtained in violation thereof would not be accepted by any court or accorded [fol. 312] judicial sanction. As Mr. Justice Douglas so aptly stated in the McDonald case, *supra*, “*We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.*”

I agree with Mr. Justice Douglas, and it must follow, that every law enforcing officer, every prosecuting attorney, every judge and justice of any court of this state who has taken a solemn oath to support the Constitution of the United States and the Constitution of the State of California, and gives his sanction to the use of evidence obtained in violation of the constitutional provisions here involved, makes of that oath, insofar as it applies to these constitutional provisions—which he has solemnly sworn to support—an empty hollow mockery.

I would grant the petition for hearing in this case, and reverse the judgment with direction to the trial court to dismiss the charge against the defendant.

Carter, J.

I concur: Schauer, J.

[fol. 313] DISSENTING OPINION ON DENIAL OF PETITION FOR
HEARING

I dissent from the order denying the petition for hearing. In my opinion a conviction which rests upon evidence of incriminating objects obtained from the body of the accused by physical abuse is as invalid as a conviction which rests upon a verbal confession extracted from him by such abuse.

"To extort testimony from a defendant by physical torture in the very presence of the trial tribunal is not due process. The case stands no better if torture induces an extra-judicial confession which is used as evidence in the courtroom.

"A trial dominated by mob violence in the courtroom is not such as due process demands. The case can stand no better if mob violence anterior to the trial is the inducing cause of the defendant's alleged confession.

"If, by fraud, collusion, trickery, and subornation of perjury, on the part of those representing the State, the trial of an accused person results in his conviction, he has been denied due process of law. The case can stand no better if, by the same devices, a confession is procured, and used in the trial.

"The concept of due process would void a trial in which, by threats or promises in the presence of court and jury, a defendant was induced to testify against himself. The case can stand no better if by resort to the same means, [fol. 314] the defendant is induced to confess and his confession is given in evidence." (*Lisenba v. California* (1941), 314 U. S. 219, 237.)

In *People v. One 1941 Mercury Sedan* (1946), 74 Cal. App. 2d 199, 213, where law enforcement officials assaulted and battered accused, compelling him to vomit an incriminatory substance, the court said that the privilege against self-incrimination "protects the accused from the process of extracting from his own lips against his will an admission of guilt, but it does not extend to the exclusion of his body as evidence when such evidence may be relevant and material. The privilege is aimed at preventing the compulsory oral examination of the accused before or during trial. Experience of many years has demonstrated that

when statements are extorted from an accused there is a strong likelihood that the extorted evidence would be unreliable. But the reason for the rule no longer exists when physical evidence is considered." This reasoning appears to ignore a problem more basic and more important in legal concept than the question of the actual guilt or innocence of the accused. We are not concerned here merely with a rule designed to exclude untrustworthy evidence; we are, or should be, as in the situations described in the above quotation from the Lisenba case, concerned with the fundamental concept of due process. The requirements of due process are just as applicable to the guilty as to the innocent.

The privilege against self-incrimination protects a guilty person from being required, by orderly process, to answer [fol. 315] questions on the ground that such answers might furnish "a link in the chain of evidence needed in a prosecution." (*Blau v. United States* (1950), — U. S. —, 19 L. W. 4062.) The person who claims this privilege before a grand jury or a court has the opportunity to establish his right to remain silent by litigation. The defendant here had no such opportunity. Without a warrant the officers broke into his room; they assaulted and battered defendant and took him away by force; by further force he was compelled to vomit and thus to produce evidence against himself. Had the evidence forced from defendant's lips consisted of an oral confession that he illegally possessed a drug, then, even though the sheriffs by physical violence had deprived him of his privilege against self-incrimination, he would have the protection of the rule of law which excludes coerced confessions from evidence. But because the evidence forced from his lips consisted of real objects the People of this state are permitted to base a conviction upon it. I find no valid ground of distinction between a verbal confession extracted by physical abuse and a confession wrested from defendant's body by physical abuse.

Schauer, J.

I concur: Carter, J.

[File endorsement omitted.]

[fol. 316] SUPREME COURT OF THE UNITED STATES

No. 450, Misc., October Term, 1950

On petition for writ of Certiorari to the District Court of Appeal of the State of California, 2nd Appellate District.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 770.

It is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

May 28, 1951.

(5946)